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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHNS-MANVILLE SALES CORPORATION and RAYBESTOS-MANHATTAN, INC. - Petitioners

versus

JAMES LEROY JACKSON - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Should uniform rules of federal law be applied to preclude additional repetitive awards of punitive damages and to control the measure of compensatory damages in nationwide asbestos tort litigation implicating a uniquely federal interest in regulating present and future competing demands by state citizens and governments on finite compensatory resources?*

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*In compliance with Supreme Court Rule 28.1, petitioners list their parent companies, subsidiaries, and affiliates as follows: Petitioner Johns-Manville Sales Corporation: Manville Sales Corporation; Manville Canada Service, Inc.; Hollophane Europe, Ltd.; and Hollophane S.A. de C.V. Petitioner Raybestos-Manhattan, Inc.: Raymark Industries, Inc. There are no parties other than those stated in the caption.

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IN THE

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No. _____

JOHNS-MANVILLE SALES CORPORATION and RAYBESTOS-MANHATTAN, INC. - - *Petitioners*

v.

JAMES LEROY JACKSON - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Johns-Manville Sales Corporation and Raybestos-Manhattan, Inc., pray that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Mississippi.

OPINIONS BELOW

The judgment of the district court is not reported and is printed in the Appendix ("App.") at 184a. The opinion by a panel of the court of appeals affirming in part, reversing in part, and remanding the case to the district court is reported at 727 F. 2d 506 (5th Cir. 1984) (App. at 121a-183a). The opinion of the court of appeals on rehearing *en banc* reinstating a portion of the panel decision and determining to certify three ques-

tions to the Mississippi Supreme Court is reported at 750 F. 2d 1314 (5th Cir. 1985) (*en banc*) (App. at 61a-120a). The opinion of the court of appeals *en banc* certifying three questions to the Mississippi Supreme Court is reported at 757 F. 2d 614 (5th Cir. 1985) (*en banc*) (App. at 56a-60a). The order of the Mississippi Supreme Court declining certification is reported at 469 So. 2d 99 (Miss. 1985) (App. at 54a-55a). The opinion of the court of appeals *en banc* affirming the district court is reported at 781 F. 2d 394 (5th Cir. 1986) (*en banc*) (App. at 2a-53a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered and filed on January 22, 1986 (App. at 2a-53a). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1976), and the due process clause of the fourteenth amendment to the Constitution of the United States are printed in the Appendix at 186a.

STATEMENT OF THE CASE

James L. Jackson worked from 1953 until 1971 at the Ingalls Shipyard in Pascagoula, Mississippi. First as a sheet metal worker and later as a supervisor, Jackson was exposed to asbestos insulation, cloth, and other

materials while working on the construction or overhaul of approximately sixty-nine ships of the United States Navy and commercial vessels. While working at Ingalls, Jackson did not personally handle asbestos-containing products, but he breathed significant quantities of asbestos dust. After leaving Ingalls in 1971, Jackson worked for a natural gas company without any subsequent exposure to asbestos. In 1978, seven years after leaving Ingalls, Jackson consulted a doctor about breathing problems. The doctor diagnosed asbestosis, but estimated Jackson's pulmonary disability at fifteen percent and did not recommend that he quit working.

Jackson filed this action on December 15, 1978, against petitioners and several other defendants alleged to have manufactured and sold asbestos products used at Ingalls. He sought compensatory damages for asbestosis as well as for the increased risk of cancer, although he did not claim that he actually had cancer. He also sought punitive damages. The case was tried to a jury in May and June of 1982 on a theory of strict liability under Mississippi law. Over petitioners' repeated objections, the district court permitted Jackson to introduce extensive testimony on his increased probability of contracting cancer and also authorized an instruction on punitive damages. The jury awarded Jackson $345,750 in actual damages, $500,000 in punitive damages against Johns-Manville, and an additional $125,000 in punitive damages against Raybestos-Manhattan. The district court entered its amended final

judgment on this verdict on June 11, 1982. *See* 757 F. 2d at 615-16 (App. at 86a) (stipulated facts).

Johns-Manville and Raybestos appealed to the Fifth Circuit, arguing in part that punitive damages in ongoing nationwide asbestos actions involving limitless demands on limited funds do not serve even the ends traditionally justifying punitive awards. They also contended that the district court had erred in permitting Jackson to bias the jury in favor of his actual claims by presenting inflammatory evidence on a disease that he did not even have. A panel of the court of appeals, which included — ironically, as it turned out — the only two Mississippi judges on the court, unanimously agreed with petitioners that introduction of evidence on an unaccrued cause of action and submission to the jury of an instruction on punitive damages was erroneous in a case implicating national concerns that transcend state boundaries. Chief Judge Clark's opinion for the panel made it clear that the court was not deciding whether Mississippi would condone punitive damages in an ordinary case of strict liability; it simply refused to authorize them under circumstances in which additional penalties are manifestly superfluous and an individual's windfall may well nullify a subsequent claimant's changes to obtain compensation for actual losses. 727 F. 2d at 529 (App. at 173a).

The Fifth Circuit voted to rehear the case *en banc*. Although the panel had based its decision on punitive damages and cancer evidence on its projection that Mississippi itself would condemn such remedies in these

extraordinary circumstances, the majority of the full court relied on *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), to conclude that denial of these damages to Jackson would constitute an impermissible resort to "federal common law." 750 F. 2d at 1323-27 (App. at 82a). The majority then certified three questions on the availability of such damages to the Mississippi Supreme Court. 757 F. 2d at 616 (App. at 60a).

In dissent, Chief Judge Clark and four other judges argued that they were not advocating any departure from the well established principles of *Erie.* Rather, "there is equally authentic authority that federal forums must impose an overarching rule to accomplish justice in litigation where the application of inconsistent rules generated by states with conflicting interests can consume the purpose of the state law itself." 750 F. 2d at 1331 (App. at 98a). The dissenters pointed out that another panel's recent decision authorizing recovery of punitive damages under Texas state law in an asbestos-related case[1] had sprung the door on the situation feared by the *Jackson* panel: a rush by the several state judiciaries to sanction maximum recoveries for their own citizens. Thus anticipating that Mississippi now would have little choice other than to stake its claim to an equal share, the dissenters advocated certification of the issues to the United States Supreme Court "as the only institution other than Congress capable of imposing the uniformity necessary

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[1]*See Hansen* v. *Johns-Manville Products Corp.,* 734 F. 2d 1036 (5th Cir. 1984), *cert. denied,* ___ U. S. ___, 105 S. Ct. 1739 (1985).

to resolve this question in a just manner . . . ." 750 F. 2d at 1333 (App. at 103a).

Not surprisingly, the Mississippi Supreme Court declined the certification without comment, thereby avoiding a problematic task that the Fifth Circuit already had evinced a willingness to perform for it. Taking up the case once again, the majority of the Fifth Circuit *en banc* relied on its prediction of Mississippi substantive law to hold that Jackson was entitled to punitive damages as well as to recovery for probability and fear of cancer. The majority thus affirmed the district court.

As characterized by the dissenters, the majority's approach is the wrong response by the wrong court: "The problems we face in this litigation are ones of national public policy," Chief Judge Clark wrote. "To respond to such policy is beyond the ability of this diversity-based court. Such policy cannot be subject to the whims of individual states because matters of national public policy have nationwide application." In the absence of a congressional solution, the five judges concluded, "the Supreme Court of the United States should have been asked to provide one." 781 F. 2d at 417 (App. at 53a).

Petitioners now ask this Court for that solution.

THE REASONS FOR GRANTING THE PETITION

I. Only a Uniform Federal Rule of Damages Can Justly Govern Awards in Nationwide Litigation Implicating the Substantial Federal Concern for Regulating Competition Among States for Scarce Resources.

The nationwide problem of asbestos-related health injuries is a catastrophe of unprecedented scope. As

Judge Clark characterized the massive litigation that it has generated, "[n]o other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure." 750 F. 2d at 1335-36 (App. at 109a). The 1984 Rand Corporation study cited by the dissenters below in their appendix on the dimensions of asbestos litigation reported 24,000 claimants who had filed product liability suits for asbestos-related injuries by March of 1983, with five hundred new claims accumulating each month. *Id.* at 1336 (App. at 110a). This avalanche of claims arises from the estimated exposure of 21,000,000 living American workers to asbestos during World War II and in the four decades thereafter. *Id.* at 1337 (App. at 113a).

The appendix compiled by Judge Clark, 750 F. 2d at 1335-41 (App. at 109a-120a), comprehensively sets forth the best available published data on the unparalleled immensity of this litigation; petitioners will not review all of this information here. Two points are especially noteworthy, however. First, the latency period for asbestos-related disease is unquestionably long — up to forty years. Since widespread use of asbestos in the workplace continued into the 1970's, manufacturers confidently can expect new claims well into the next century. 750 F. 2d at 1336 (App. at 111a). Second, available estimates raise what Judge Clark described as a "real and present danger" that *compensatory* liabilities accruing over the next decades ultimately will outstrip the combined assets of the manufacturers and

their insurance companies. 750 F. 2d at 1330 (App. at 96a).

The conclusions of Judge Lifland in the Johns-Manville bankruptcy are perhaps the most convenient source for illustrating this danger. In the course of finding that Johns-Manville had filed its chapter 11 petition in good faith, the court noted that Johns-Manville's projection of its ultimate liabilities at $1.9 billion was not only conservative but "perhaps understated." The projections "took into account only the moderate to severe asbestos disease cases, assumed full insurance recovery, did not escalate costs, *and did not include punitive damages in the cost calculations.*" *In Re Johns-Manville Corp.*, 36 Bankr. 727, 735 (Bankr. S.D.N.Y. 1984) (emphasis added). Against this "perhaps understated" but still gargantuan estimate of compensatory liabilities is opposed "an estimated net worth of only $1 billion." 750 F. 2d at 1340 (App. at 119a).

With the ability of petitioners and other members of the industry to keep pace with the rising tide of compensatory demands already in doubt, petitioners increasingly have confronted the unchecked demands of individual claimants for massive punitive awards. Of the one hundred forty-seven asbestos cases tried as of 1982, twenty-one plaintiffs had garnered a total of $39,468,002 in punitive damages. Asbestos Litig. Rep. (Andrews) 5663-71 (Oct. 8, 1982). These punitive awards alone would satisfy over one hundred claims for compensatory damages like Jackson's, even including his recovery for "increased probability of cancer."

Petitioner Johns-Manville alone incurred through 1984 ten punitive awards averaging $616,000 each. *In Re Johns-Manville,* 36 Bankr. 743, 746 (Bankr. S.D.N.Y. 1984). As Judge Clark emphasized below, the trend is toward higher punitive judgments. 750 F. 2d at 1339 (App. at 116a). Even since this case was argued in the court of appeals, another federal appellate court has affirmed the award of $1,500,000 in punitive damages to a single plaintiff under Tennessee law. *Cathey* v. *Johns-Manville Sales Corp.,* 776 F. 2d 1565 (6th Cir. 1985).

Nor do individual plaintiffs and their attorneys form the only sizeable group clamoring for a share of available funds. The 1980's have witnessed the emergence of numerous suits filed by state and local governments demanding not only compensation for the cost of removing asbestos from schools and other public buildings, but also the now obligatory insistence upon punitive damages. *See In re Johns-Manville, supra,* 36 Bankr. at 739 (citing individual district and class actions brought against Johns-Manville and others before and after the bankruptcy petition). The United States Department of Education itself has predicted that the cost of asbestos abatement in schools *alone* will reach $1.4 billion. *Id.* at 739 (citing U. S. Dept. of Education, *Asbestos in The Schools: A Report to Congress* 26-27 (1979)). As recently as December 30, 1985, the Commonwealth of Kentucky filed an action claiming not only $68 million in abatement costs, but punitive damages in an unstated amount. *Common-*

wealth of Kentucky v. *U. S. Gypsum Co., et al.*, No. 85-CV- 1915 (Franklin Cir. Ct.) (pending).

Like actions filed by individual state citizens, abatement actions filed by state and local governments leave state courts with little or no incentive to consider adoption of conservative remedies attuned to the financial needs of citizens and governments in other states. On the contrary, the state's interest points in the opposite direction. The all too understandable impetus is to sanction maximum recovery by state claimants while recovery is still to be had. A state court in Texas — or, by implication, a federal court bound by Texas law — cannot realistically cherish the notion that it should nobly diminish the opportunities of Texas claimants so that future hordes of Californians will not feel the pinch. The result is as inevitable as it is unconscionable: a state by state scramble for dwindling resources.

More disastrously still, the extraordinary inequities of the asbestos phenomenon coincide with the increasingly frequent abdication by state courts of their responsibility to exercise a judicial restraint on lay passions resulting in outlandish financial penalties. This Court is reviewing at this writing a case in which the Alabama Supreme Court affirmed the award of $3,500,000 in punitive damages based on a compensatory award of $1,650.22 — a ratio of 2,121 to 1. *Aetna Life & Casualty Co.* v. *Lavoie*, No. 84-1601 (U. S. Oct. term 1985). While perhaps the most egregious example available, *Lavoie* is not an anomaly. On the contrary, Professor David Owen, author of a 1976 article cited by the majority below as authority for the appro-

priateness of punitive damages in a strict liability action, 781 F. 2d at 401 (App. at 17a), published a second article in 1982 expressing concern that "the increasing number and size of such awards may fairly raise concern for the future stability of American industry." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 6 (1982).

The growing unmanageability of punitive awards is a national problem that inevitably must challenge state and federal courts to exercise judicial restraint in every context.[2] Petitioners are asking this Court to address the issue only in a very narrow context: that in which states necessarily are vying for access to limited

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[2]Several members of this Court already have voiced concern over the inequities of punitive damages. In *Electrical Workers* v. *Foust*, 442 U. S. 42, 50 (1979), Justice Marshall observed that "[b]ecause juries are accorded broad discretion as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial." In *Smith* v. *Wade*, 461 U. S. 30 (1983), Justice Rehnquist commented in dissent that the doctrine of punitive damages is contrary to the compensatory purpose of our legal system, permitting the award of damages "beyond even the most generous and expansive conception of actual injury to the plaintiff." *Id.* at 57-58. Justice Rehnquist also noted the wide variation in the standards used by the states to authorize punitive damages. *Id.* at 59-60. In yet another dissent, Justice Brennan quoted Justice Rehnquist's dissent in *Smith* v. *Wade* in recognition that "the alleged deterrence achieved by the punitive damage awards is likely to be outweighed by the cost—such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, — U. S. —, 105 S. Ct. 2939, 2956-57 n. 4 (1985) (*quoting* 461 U. S. at 59).

corporate resources, the extinction of which promises serious repercussion both on the states and their citizens and on the federal treasury. The majority and the minority on the court below unite in agreement that this national disaster merits and requires a federal solution, even the majority reserving "no doubt that a desperate need exists for federal legislation in the field of asbestos litigation." 750 F. 2d at 1327 (App. at 90a). The majority, however, reads the recent decisions of this Court to mean that only Congress can solve the problem. *Id.*

Petitioners respectfully disagree. Principles governing the authorization of punitive damages and the measure of compensatory awards have always been prerogatives of the courts. If the extraordinary circumstances of this case justify the application of uniform federal laws when examined under the narrow standard developed by this Court since *Erie,* the federal judiciary should not shrink from "displacing" a welter of competing state rules that threaten intolerable injustices to American citizens on both sides of the asbestos controversy. A federal judicial solution is both theoretically sound and urgently needed.

II. Decisions by This Court since *Erie* Demonstrate That Uniform Judicial Principles Protecting Federal Values Remain Appropriate in Multistate Litigation Involving Uniquely Federal Interests.

In *Erie,* this Court interpreted the Federal Rules of Decision Act, 28 U.S.C. § 1652, to mean that state law ordinarily must govern the federal courts sitting in actions founded on diversity of citizenship. Justice

Brandeis issued the now famous pronouncement that "there is no general federal common law." A less publicized opinion by Justice Brandeis handed down on the same day, however, signified the importance of the adjective "general." In *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938), the Court drew upon pre-*Erie* decisions in concluding that competing state interests are inappropriate sources for a rule of law allocating interstate resources. Thus, "whether the water of an interstate stream must be apportioned between two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110.

Subsequent decisions by this Court regularly have renewed the vitality of federal common law in diversity cases, though always taking care to circumscribe the bounds of application. In *United States* v. *Standard Oil Co.*, 332 U. S. 301 (1947), the Court found state law an inappropriate source of tort law for determining whether the United States could recover damages suffered when a third-party tortfeasor injures a member of the armed forces. The Court described *Erie* as an effort to subordinate federal judicial power to state authority "in matters essentially of local interest and state control." *Erie* commands no such subordination where diversified state decisions would threaten an important federal interest: "[T]here was no purpose or effect [in *Erie*] for broadening state power over matters essentially of federal character or for determining whether issues are of that nature." *Id.* at 307.

The Court returned to *Hinderlider* in deciding that federal law must control a dispute over the pollution of Lake Michigan. Justice Douglas' opinion in *Illinois* v. *Milwaukee,* 406 U. S. 91 (1972), suggests that the Court was unmoved by arguments that a federal solution to an immediate problem must await congressional intervention:

> Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

406 U. S. at 107 n. 9 (*quoting Texas* v. *Pankey,* 441 F. 2d 236, 241-42 (10th Cir. 1971)).[3]

Also suggestive of those circumstances under which uniform federal law is applicable are decisions by this Court rejecting appeals for the creation of federal common law. In *Miree* v. *DeKalb County,* 433 U. S. 25 (1977), the Court declined an invitation to apply federal law when victims of a plane crash sought recovery as third-party beneficiaries of a contract be-

[3]The Court subsequently held that the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, passed six months after the decision in *Illinois* v. *Milwaukee,* had displaced common law in the action brought by Illinois over the pollution of Lake Michigan. *Milwaukee* v. *Illinois,* 451 U. S. 304 (1981).

tween a county and the federal government involving airport safety. Reiterating that "federal common law may govern even in diversity cases where a uniform national rule is necesary to further the interests of the Federal Government," *id.* at 29, Justice Rehnquist found that the government's conceded interest in regulating air travel did not require application of federal law to resolve a "breach-of-contract claim [that would] have no direct effect upon the United States or its Treasury." *Id.*

Concurring in *Miree,* Chief Justice Burger did not read the Court's decision as "rigidly limiting the application of 'federal common law' to only those situations where the rights and obligations of the Federal Government are at issue." 433 U. S. at 34. Writing the opinion for the Court in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U. S. 630 (1981), the Chief Justice devised this statement of the law in the course of refusing to fashion a federal rule of contribution among defendants guilty of antitrust violations:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under State law, either because the authority and duties of the United States as sovereign are intimately involved *or because the interstate or inter-*

> *national nature of the controversy makes it inappropriate for State law to control.*

Id. at 641 (footnotes omitted; emphasis added).

Unquestionably, all of these decisions reaffirm the fundamental notion that occasions for application of federal common law must remain "few and restricted." *Wheeldin* v. *Wheeler,* 373 U. S. 647, 651 (1963). Just as clearly, however, this Court repeatedly has refrained from defining these rare instances in terms of specific causes of action, parties, or interests. The standard has remained narrow, but flexible. The progeny of *Hinderlider* still authorize resort to uniform principles of federal law on those infrequent occasions when litigation presents a significant conflict between a demonstrable federal interest and adherence to the law of a single state. The majority of the court below concluded that "this case is not an appropriate one for the creation of a federal common law because of the absence of a uniquely federal interest and the practical problems that would attend the displacement of state law." 750 F. 2d at 1327 (App. at 89a). A review of the majority's analysis reveals that it was wrong on both counts.

III. The Court Below Erroneously Concluded That This Case Implicates No "Uniquely Federal Interest."

However one interprets *Hinderlider* and subsequent decisions on the appropriateness of federal rules of decision, the threshold prerequisite is the identification of a federal interest. In this case, that interest is multifaceted. At its heart, however, lies the "uniquely federal interest" in preventing the unregulated ex-

haustion of finite compensatory resources through non-compensatory judgments awarded state by state under state law in response to the competing demands not only of individual state citizens but of state and local governments themselves. The inevitable result of this interstate judicial fiasco will be threefold: (1) the preference of present over future injured claimants and, because of inconsistencies in state laws, of some state citizens and government over others; (2) the financial ruin of a national industry otherwise still capable of productivity in other areas, with the concomitant loss of jobs, the elimination of tax revenues, and the inability to satisfy public and private debts; and (3) an ultimate burden on the federal purse, as both the unemployed and the uncompensated seek relief from welfare, social security, medicare, medicaid, the Veterans Administration, and other public programs charged with paying the price for private incapacity. The three arguments used by the court below to dismiss the federal nature of this national tragedy do not withstand close scrutiny.

First, the court of appeals distills from *Hinderlider* and *Illinois* v. *Milwaukee* the assertion that federal law preempted state law in those cases because they involved disputes "between states as quasi-sovereign bodies over shared resources." 750 F. 2d at 1324 (App. at 84a). Neither *Hinderlider* nor any of the other decisions discussed in section II above, however, defined "quasi-sovereign rights" as an essential component of a federal interest in an interstate controversy over limited resources. *Hinderlider* turned on this Court's recognition that application of one state's laws

to the detriment of another state's citizens in an ongoing dispute over scarce resources would be intolerable. Thus, the controversy over interstate water rights, like this dispute over compensatory funds, rises to the dignity of a federal interest because it generates an ultimately destructive competition among state laws to secure maximum advantage for the interests of each state's citizens.

Second, the majority moves to a comparably unfounded requirement that a federal interest "must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign." 750 F. 2d at 1325 (App. at 85a). The court's statement is incorrect because it is incomplete. The last phrase of the court's statement is drawn from Chief Justice Burger's opinion in *Texas Industries, supra,* 451 U. S. at 641, but it omits the crucial language recognizing a federal interest where "the interstate or international nature of the controversy makes it inappropriate for state law to control." The present case requires application of federal law less because it involves the sovereign duties of the United States — although it does — than because competing state interests make it particularly "inappropriate for state law to control."

Third, the majority's misconstruction of the standard for identifying a federal interest compels its erroneous conclusion that petitioners "have been unable to point to any substantive right or duty of the federal government that would be directly affected by the outcome of this litigation." 750 F. 2d at 1325 (App. at

86a). The majority erects a straw man by suggesting that the only federal interest identified by petitioners is an abstract concern for justice. "If justice could be used as a justification for the naked exercise of federal judicial power," it then concludes easily, "the Supreme Court's oft-repeated assertion that the instances in which federal common law governs are 'few and restricted' would no longer be true." *Id.* at 1326 (App. at 88a). Having thus relegated the federal interest at stake to an easily dismissible abstraction, the court glides imperceptibly into an argument based not on the absence of a demonstrable federal interest, but on the declared impossibility of addressing such an interest while ensuring that occasions for creation of federal law remain few and restricted.

It is vital to identify this concern, the familiar "slippery slope," as the crux of the refusal by the court below to undertake construction of a federal remedy. The majority never mustered any conviction behind its conclusion that this litigation presents no cognizable federal interest. On the contrary, its perception of a "desperate need" for congressional action betrays the court's recognition that the asbestos phenomenon is a national crisis not susceptible to resolution state by state. In circumventing *Hinderlider* and *Illinois* v. *Milwaukee,* the majority never countered Chief Judge Clark's observation that "[a]n equitable resolution of this nationwide competition for scarce assets is surely as important to the basic interests of federalism as the equities invoked to justify the formulation of a common law of nuisance to resolve the dispute between the

several bordering states over the pollution of Lake Michigan." 750 F. 2d at 1332 (App. at 100a). The question that chiefly preoccupied the court below is whether the federal judiciary can afford protection to federal values in this case without eviscerating *Erie*. The court of appeals focused on the right issue, but it too quickly embraced the wrong answer.

IV. The Court Below Erroneously Assumed That There are No "Principled Means" for Applying Federal Law in This Case and Restricting It In Others.

The court below announced itself unable to discover "any governing principle of easy application" for imposing federal law in asbestos litigation.

> The simple fact is that, once the need to limit plaintiffs' recoveries is used to justify the creation of federal substantive rules precluding the recovery of punitive damages and narrowing the scope of the actionable injury, there would be no principled means of restricting the application of federal common law to other matters, either in the context of asbestos litigation or in relation to similar legal problems.

750 F. 2d at 1326-27 (App. at 89a). Looming largest behind the majority's rationale, therefore, is the apprehension that a judicially crafted federal law of damages in the asbestos context will prove uncontainable, bursting the venerable dam of *Erie* and washing first into all other areas of the asbestos litigation itself before sweeping into every other conceivable type of litigation. However, the court's opinion reveals no real effort to arrive at principled means for accommodating

the federal interests at stake in this litigation. The majority was all too willingly defeated at its task.

The asbestos litigation is *sui generis.* Some state courts already have carved out special rules of law based on nothing more precise than an "asbestos exception."[4] While the unprecedented magnitude of the asbestos tragedy may not in itself qualify as a "principled means" for imposing a federal rule of damages, it does make possible the identification of sufficiently definite criteria that courts could use to contain the deluge envisioned by the majority below. Five such criteria are as follows:

1. **DOES THE LITIGATION AS A WHOLE PRESENT A SUBSTANTIAL PROBABILITY THAT DISSIPATION OF LIMITED FUNDS IN PUNITIVE AWARDS OR OTHER DAMAGES UNRELATED TO ACTUAL LOSSES WILL FORECLOSE THE OPPORTUNITY FOR RECOVERY OF COMPENSATION BY SUBSEQUENT CLAIMANTS?**

Not every tort action, nor even every "mass tort" action, will meet this requirement. Consider, for example, the litigation initiated by veterans and their families against manufacturers of the chemical defoliant "Agent Orange." Plaintiffs were pressing for uniform federal rules, relying principally on the federal interest bound up in the relationship between the government and members of its armed forces. Preser-

[4]*See e.g., Feldman* v. *Lederle Laboratories,* 479 A. 2d 374 (N.J. 1984) ("state of the art" defense is available in all product liability actions *except* those arising from exposure to asbestos.) *See also In re Asbestos Litigation,* — F. Supp. —, 54 U.S.L.W. 2427-28 (D.N.J. 1986) (upholding *Feldman* rule against equal protection challenge in these "atypical product liability cases").

vation of scarce financial resources was not the object of concern. Opposing the move to establish federal rules of decision, the defendants argued that "plaintiffs do not have the temerity to argue that the aggregate claims of the purported class exceed the total assets of the five named defendants. Such an argument would be ludicrous on its face." *In re "Agent Orange" Product Liability Litigation,* 506 F. Supp. 737, 747 n. 5 (E.D.N.Y. 1979), *rev'd,* 635 F. 2d 989 (2d Cir. 1980).

The "limited fund" criterion thus distinguishes the asbestos litigation from other classes of cases in which the ability of the defendants to satisfy all claimants has not seriously been questioned. The extinction of finite resources through noncompensatory awards to winners of the race to the courthouse is not merely unfair; it inescapably results in demands on public funds to make up the difference. This consideration led the Department of Justice to join petitioners in the court below in arguing against punitive and other speculative damage awards in asbestos-related cases. Defining its interest as amicus curiae, the United States expressed its concern "that if private resources are eroded so as to prevent full recovery by future plaintiffs, resort will ultimately be had to the public fisc in order to insure full justice for tort victims." Brief for the United States as Amicus Curiae at 5. The United States further noted that the federal taxpayer already bears "a significant part of the cost of compensating asbestos victims . . . through various health and income maintenance programs such as So-

cial Security disability, veterans' disability and health care benefits, and medicare/medicaid." *Id.* n. 1. Cases not involving a threat to limited funds obviously would not affect this particular federal interest.

2. DOES THE COMPETITION FOR LIMITED RESOURCES TRANSCEND STATE BOUNDARIES, WITH THE MEANS OF RECOVERY AVAILABLE TO CITIZENS OF ONE STATE CLEARLY AFFECTING THE EXTENT OF RECOVERY AVAILABLE TO THOSE OF OTHERS?

This is an important supplement to the "limited fund" element, since a comparable rush to stake a disproportionate claim to a finite fund might well occur in a case confined to a single state. Such a case would pose less of a threat to the federal treasury, since the state's own interest in preserving benefits for future claims by its own citizens would create incentive for state law to devise a conservative remedy for the benefit of subsequent state plaintiffs. In an interstate contest for funds, however, the competing interests of the states weigh heavily against restraint. As the court below recognized, each state judiciary feels the pressure to maximize the level of damages immediately available to the state's injured claimants, well aware that isolated acts of judicial prudence will only leave available resources at the mercy of imprudent decisions elsewhere. It is this feature of the asbestos litigation that "makes it inappropriate for state law to control." *Texas Industries, supra,* 451 U. S. at 641.

3. CAN AN EXISTING PROCEDURAL DEVICE SUCH AS A CLASS ACTION PROTECT THE FEDERAL INTERESTS AT STAKE WITHOUT ASSISTANCE FROM A UNIFORM SUBSTANTIVE RULE?

Efforts by district judges to consolidate mass torts into class actions have encountered opposition not only from the parties themselves but also from appellate courts.[5] The class action nevertheless may offer a solution in many types of mass tort litigation that do not involve the problems of causation and long-term latency presented by asbestos suits. Judge Weinstein successfully certified a national class in the Agent Orange dispute, *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983), *petition for mandamus denied,* 725 F. 2d 858 (2d Cir.), *cert. denied,* __ U. S. __, 104 S. Ct. 1417 (1984). The court's ruling included certification of a national class on punitive damages under Fed. R. Civ. P. 23(b)(1)(B). *Id.* at 724-28. In discussing the certification generally, however, Judge Weinstein noted that special issues of causation made a class action more efficient in the Agent Orange litigation than it would be in litigation over asbestos and certain other types of products. *Id.* at 723.

Neither national nor district-by-district class certifications can solve the problem of punitive overkill in the asbestos litigation. Single district class certifications like that recently approved by the Fifth Circuit

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[5]*See, e.g., In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 526 F. Supp. 887, 903 (N.D. Cal. 1981), *vacated,* 693 F. 2d 847 (9th Cir. 1982), *cert. denied,* 459 U. S. 1171 (1983); *In re Federal Skywalk Cases,* 93 F.R.D. 415, 419 (W.D. Mo.), *vacated,* 680 F. 2d 1175 (8th Cir.), *cert. denied,* 459 U. S. 988 (1982). *See also Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control,* 52 Fordham L. Rev. 37, 69-70 n. 173 (1983).

in the Eastern District of Texas[6] not only divorce punitive damages from compensatory damages — which still must be determined individually — but merely fragment the national competition for assets on a new basis.[7] A large punitive award for a class in one district of one state based on that state's law is no more likely to protect the interest of claimants in other districts in other states, or of future claimants, than are individual awards. Even a national class for punitive damages in asbestos suits could never answer the needs of unknown thousands of claimants whose actions will mature into the next century. Problems of applying the conflicting and competing state rules on damages also would remain.[8] As the panel below concluded in

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[6]*See Jenkins* v. *Raymark Industries, Inc.*, slip op. no. 85-2815 (5th Cir. Feb. 5, 1986). Under this inequitable arrangement, the class jury will determine punitive damages *first*, actual damages being reserved for later "mini-trials."

[7]The asbestos litigation is being fragmented not only by state and district, but also by type of claim. The Eastern District of Pennsylvania has certified a national class of all public school districts and private schools seeking damages for asbestos removal. *In Re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984). Naturally, the plaintiffs' demands include the mandatory insistence on punitive damages, and the district court has certified a punitive damages class under Fed. R. Civ. P. 23(b)(1)(B). However well this may assist in ensuring that no school board misses its share of the booty, it will little comfort future personal injury claimants whose interests are nowhere represented in the school class action.

[8]Judge Weinstein solved the conflicts problem in the *Agent Orange* class litigation only by assuming that each state would apply "federal or national consensus common law." 580 F. Supp. at 712. His dilemma demonstrates that even mass torts susceptible to class resolution necessitate resort to uniform principles of federal law.

its opinion, "the vital legal issues would not be common to all plaintiffs, nor would the appropriate legal standards be identical in all jurisdictions in which the cases would arise." 727 F. 2d at 527 (App. at 169a).

The only workable means of assuring the long-term survival of adequate compensatory resources for all those afflicted by asbestos-related diseases is the application of federal law to eliminate wasteful and unnecessary punitive awards as well as purely speculative damages for unaccrued claims.

4. DOES THE PROPOSED FEDERAL RULE DISPLACE STATE RULES OF DECISION SERVING A SUBSTANTIAL STATE INTEREST?

The states have an obvious interest in seeing that all state citizens who suffer from asbestos-related diseases eventually secure adequate compensation. The only justification for the state courts' continuing to authorize awards of damages unrelated to compensation for actual injuries is the conviction that a more conservative approach by a single state court will be futile. A national rule confining damages to compensation for present injuries thus would "displace" only an unwelcome competition that is adverse to the long-term interest of every state.

This criterion also distinguishes a federal rule on damages from other possible requests for displacement of state law. The majority below used the example of a statute of limitations as a comparable state rule having "a direct impact on aggregate recovery and thus the availability of funds for future claimants." 750 F. 2d at 1326 (App. at 89a). This impact, however, is not

significant enough to overcome the state's legitimate interest in regulating the presentation of claims. State statutes of limitations for personal injury may vary considerably, but they are never draconian. They penalize only the claimant who neglects his rights, not, like the excessive damages in issue here, blameless claimants whose injuries have not yet occurred. Thus, the minimal effect of limitations periods on the asserted federal interest does not outweigh the substantial state interest in barring stale claims.

5. DOES THE CASE IMPLICATE OTHER COGNIZABLE FEDERAL INTERESTS?

Some cases may exhibit additional federal interests that, weighed into the balance, strengthen the appropriateness of adopting federal rules of decision. One such interest in this case is a federal responsibility for ensuring adequate compensation to those injured in industrial activities necessary to national defense. A substantial portion of the asbestos litigation arises from injuries sustained by workers during and after World War II while constructing or repairing ships for the United States Navy. Respondent Jackson himself suffered his exposure to asbestos in this manner. Although the United States has remained largely insulated from tort liability to government workers as well as to asbestos manufacturers seeking indemnity in actions filed by those injured in government service,[9] the

[9]*See, e.g., In re All Maine Asbestos Litigation (PNS Cases)*, 772 F. 2d 1023 (1985). *But see Johns-Manville Sales Corp* v. *United States*, Asbestos Litig. Rep. (Andrews) 10,681 (N.D. Cal. 1985) (Johns-Manville states claim for indemnity against U. S. under California law because of "special relationship" between Johns-Manville and government during World War II).

United States can hardly disclaim an interest in seeing that recovery is available from private funds. The relationship between the government and workers in defense industries may not suffice by itself to justify imposition of federal law, but it certainly is a feature worthy of consideration.

Second, repetitive punitive awards against petitioners and other members of the asbestos industry raise serious issues under the due process clause of the fourteenth amendment. As Judge Spencer Williams wrote in *Dalkon Shield, supra,* 526 F. Supp. at 899, "[a] defendant has a due process right to be protected against unlimited multiple punishment for the same act. . . . [O]ver-lapping damages awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." *See also In re Federal Skywalk Cases,* 680 F. 2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting), *cert. denied,* 459 U. S. 988 (1982); K. Redden, *Punitive Damages* § 7.2 at 602-10 (suggesting that punitive damages violate the fourth, fifth and sixth amendments); Note, *Mass Liability and Punitive Damages Overkill,* 30 Hastings L. J. 1797, 1797-1800 (1979).

These criteria form the rudiments of a "principled means" for continuing to guarantee that occasions for applying federal common law remain few and restricted. The Fifth Circuit simply refused to examine its ready belief that assumption of much-needed federal judicial control over the accelerating destruction of available funds in the asbestos controversy must sunder the *Erie* doctrine in other tort contexts. If the federal

judiciary wishes to stand aloof as this crisis deepens, it must discover other principled means for doing so.

CONCLUSION

This case implicates a substantial federal interest in preventing a wasteful and proliferating struggle among citizens and governments of the several states for a bottomed pool of money. Rigid adherence to variant state damage remedies under these extraordinary circumstances serves no principle of federalism, nor does it honor the objective of *Erie*: "to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control." *Standard Oil, supra,* 332 U. S. at 307. It is a harsh principle of federal jurisprudence that confers substantive importance on interstate apportionment of a non-navigable stream while relegating to "local interest" the piecemeal dismemberment of a national industry and the squandering of finite resources through disproportionate draws by citizens whom chance has positioned "upstream."

Chief Judge Clark and four other judges on the court below concluded over a year ago that "[t]he Supreme Court, as the only institution other than Congress capable of imposing the uniformity necessary to resolve this problem in a just manner, should be afforded the chance to deal with the singular problem presented by these cases." 750 F. 2d at 1333 (App. at 103a). Even if petitioners and the five dissenting judges below are wrong, even if the federal judiciary perceives itself prudentially and unalterably obliged

to abstain from fashioning relief in the midst of this national disaster, that message to Congress should come, finally and unequivocally, from the highest source of judicial authority.

Petitioners thus urge the Supreme Court of the United States to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and to authorize the application of a uniform federal measure of damages in asbestos litigation.

Respectfully submitted,

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[LETTERHEAD OF THE UNITED STATES COURT OF APPEALS—FIFTH CIRCUIT]

February 25, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 82 4288—JACKSON -vs- JOHNS-MANVILLE,
(S79 0211 "R")

The following action has been taken in the above case:

☐ AN EXTENSION OF TIME has been granted to and including
- ☐ for filing appellant's/petitioner's brief.
- ☐ for filing appellee's/respondent's brief.
- ☐ for filing reply brief.
- ☐ for filing petition for rehearing.
- ☐

☐ Motion to consolidate granted.
☐ Motion to supplement or correct the record granted.
☐ Motion for leave to file supplemental brief granted.
☐ Motion for leave to file brief *amicus curiae* is granted.
☐ Joint motion as to time for filing briefs granted.
☐ Order enclosed has been entered.
☒ The unopposed motion of appellants to stay the mandate has been granted to and including March 26, 1986.

GILBERT F. GANUCHEAU, Clerk

(s) By: A. S. Rondens
Deputy Clerk

cc: All Counsel for Parties

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 82-4288

JAMES LEROY JACKSON, - - - *Plaintiff-Appellee,*

v.

JOHNS-MANVILLE SALES CORPORATION and
RAYBESTOS-MANHATTAN, INC., - *Defendants-Appellants.*

Former shipyard worker brought strict liability action against manufacturers of asbestos products which allegedly failed to contain warning label of dangers associated with asbestos exposure. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., Chief Judge, rendered judgment for the former worker. The Court of Appeals, 727 F. 2d 506 remanded. On rehearing en banc, Court of Appeals, 750 F. 2d 1314, reinstated portion of panel opinion. Open questions of state law were certified to the Mississippi Supreme Court, 757 F. 2d 614. The Mississippi Supreme court declined certification, 469 So. 2d 99. The Court of Appeals, Randall, Circuit Judge, held that: (1) Mississippi law permits punitive damages in products liability actions, including "mass tort" cases; (2) recovery could be had for reasonable medical probability of contracting cancer in the future; and (3) damages could be had for mental distress resulting from knowledge of increased risk of contracting cancer.

Affirmed.

Clark, Chief Judge, filed dissenting opinion in which Gee, Garza, Politz, and Jolly, Circuit Judges, joined.

1. **Federal Courts Key 390**

In filing a void in state law the federal court may not do merely what it thinks best but, rather, must do that what it thinks the state's highest court would deem best.

2. **Federal Courts Key 392**

Mississippi Supreme Court's denial of certification of open questions of state law did not give federal court a license to change state law.

3. **Federal Courts Key 391**

When making an *Erie* guess in the absence of specific guidance from the state's highest court, a federal court's prediction of state law looks to lower state court decisions and state supreme court dicta, the lower court ruling in its case, general rule on the issue, the rule in other states looked to by subject states courts when they formulate state substantive law and other available legal resources, such as treatises and law review commentaries.

4. **Damages Key 89(1)**

Under Mississippi law, punitive damages are recoverable in an action based on strict liability in tort, such as products liability; declining to follow *Gold* v. *Johns-Manville Sales Corp.*, 553 Fed. Supp. 482 and *Sanford* v. *Selotex Corp.*, 598 Fed. Supp. 529.

5. **Damages Key 87(1)**

Under Mississippi law, punitive damages are available in "mass" tort cases, i.e., cases in which defendant may suffer multiple awards of conpensatory and punitive damages; declining to follow *Gold* v. *Johns-Manville Sales Corp.*, 553 F. Supp. 482.

6. **Federal Courts Key 415**

In reviewing whether the record supports punitive damages, the appellate court applied state substantive law but a federal standard of review.

7. Damages Key 184

Evidence in products liability action brought against asbestos manufacturer by former shipyard worker who had contracted asbestosis furnished more than an adequate basis for concluding that manufacturers had shown gross disregard for worker's rights, warranting award of punitive damages under Mississippi law.

8. Federal Courts Key 612

Only evidence of defendants' financial condition that federal court could consider in reviewing award of punitive damages under state law was that introduced by the plaintiff; argument that fact that asbestos case was one of thousands should have had some impact on the award should have been made to the jury in the first instance.

9. Damages Key 94

Award of $625,000 punitive damages against asbestos manufacturers was not unreasonable, where one manufacturer had net worth of over $2.3 billion and net earnings of over $80 million and the other had net worth of nearly $50 million.

10. Damages Key 27

Under Mississippi law, former shipyard worker, who brought products liability suit against asbestos manufacturers to recover for his asbestosis, was also entitled to recover for the reasonable probability of his developing cancer, in view of medical evidence that he had over 50 percent chance of developing cancer.

11. Damages Key 49.10, 52

Former shipyard worker's fear, based on medical evidence that because of asbestosis he had greater than 50 percent chance of getting cancer, was a present injury and

was compensable, under Mississippi products liability law; furthermore, compensatory damages for mental distress were independently recoverable on ground of manufacturers' gross misconduct.

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Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, and HILL, Circuit Judges.*

RANDALL, Circuit Judge.

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*Judge Jerre S. Williams did not participate in the decision of this case. Judge Edith H. Jones was not a member of this Court when this issue was submitted to the Court en banc and did not participate in this decision.

This Mississippi diversity case involves plaintiff Jackson's efforts to recover compensatory and punitive damages from Johns-Manville Sales Corporation, Raybestos-Manhattan, Inc., and H. K. Porter Company, all manufacturers of asbestos products. Jackson was injured as a result of his exposure to asbestos products during the course of his employment as a shipyard worker. The district court, after a lengthy trial, entered judgment in favor of Jackson against all defendants except H. K. Porter Company in the amount of $391,500 in compensatory damages and $625,000 in combined punitive damages. On appeal, a panel of this court affirmed in part, reversed in part, and remanded for a new trial. *Jackson* v. *Johns-Manville Sales Corp.*, 727 F. 2d 506 (5th Cir. 1984) ("Jackson I"). We granted en banc rehearing, which had the effect of vacating the panel opinion. *See* Fifth Circuit Internal Operating Procedures, *Rules of the United States Court of Appeals for the Fifth* Circuit 98 (July 1983). Upon rehearing en banc, we certified to the Mississippi Supreme Court three significant questions of Mississippi law. *Jackson* v. *Johns-Manville Sales Corp.*, 750 F. 2d 1314 (5th Cir. 1985) (en banc) ("Jackson II"). The Mississippi Supreme Court declined certification without discussion. *Jackson* v. *Johns-Manville Sales Corp.*, 469 So. 2d 99 (Miss. 1985). The case is consequently back before us for resolution of the issues previously certified to the Mississippi Supreme Court.

The three issues left unresolved by this court's en banc opinion in *Jackson II* are as follows:

> (1) whether a Plaintiff whose cause of action is based upon strict liability in tort can recover punitive damages against Defendants who have been or may be subjected to multiple awards of compensatory and punitive damages for the same wrongful conduct.

(2) whether a Plaintiff who does not presently have cancer can state a claim or recover damages in an action based upon strict liability in tort for mental distress resulting from his knowledge that he has an increased risk of contracting cancer in the future;

(3) whether a Plaintiff who does not presently have cancer can state a claim or recover damages in an action based upon strict liability in tort for the reasonable medical probability of contracting cancer in the future.

We now answer each question affirmatively, and affirm the judgment of the district court.

I. PROCEDURE FOR CONSTRUING MISSISSIPPI LAW[1]

The en banc court determined that Mississippi law, and not federal common law, properly governs the resolution of these issues.[2] Thus, we must interpret the law as would a Mississippi court. *Erie R.R.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In making an *Erie* guess, "[i]t is our duty . . . to view ourselves . . . as an inferior state court and to reach the decision that we think a state court would reach." *Dipascal* v. *New York Life Ins. Co.,* 749 F. 2d 255, 260 (5th Cir. 1985). Even "[i]n the absence of controlling precedent, we must . . . decide . . . issue[s] as we believe a Mississippi court would decide [them]." *Green* v. *Amerada-Hess Corp.,* 612 F. 2d 212, 214

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[1]We dispense with a recitation of the facts. They are fully discussed in *Jackson I,* 727 F. 2d at 509-11. The procedural history is recounted in *Jackson II,* 750 F. 2d at 1316-17. This opinion will address only those questions left unanswered by *Jackson II;* all other issues in this case, including, for example, the issue of Raybestos-Manhattan's liability, have been resolved and are not open for reconsideration.

[2]*Jackson II,* 750 F. 2d at 1322, 1323-27.

(5th Cir.), *cert. denied,* 449 U. S. 952, 101 S. Ct. 356, 66 L. Ed. 2d 216 (1980)

[1] As a federal court, "it is not for us to adopt innovative theories of [state law], but simply to apply that law as it currently exists," *Galindo* v. *Precision American Corp.,* 754 F. 2d 1212, 1217 (5th Cir. 1985), and to rule as we believe the state's highest tribunal would rule, *Green,* 612 F. 2d at 214. We are emphatically not permitted to do merely what *we* think best; we must do that which we think the Mississippi Supreme Court would deem best. *See, e.g., United States* v. *Little Joe Trawlers, Inc.,* 776 F. 2d 1249, 1253 (5th Cir. 1985) ("In our *Erie* role, we make no value judgments as to what [Mississippi] law out to be."). If the law of Mississippi is to be changed, "[i]t is up to the Supreme Court of [Mississippi] and not this court to change the substantive law of that state." *Cargill, Inc.* v. *Offshore Logistics, Inc.,* 615 F. 2d 212, 215 (5th Cir. 1980). Finally, "under *Erie* we cannot skirt the clear import of state decisional law solely because the result is harsh." *Parson* v. *United States,* 460 F. 2d 228, 234 (5th Cir. 1972).

[2] The denial of certification does not give us a license to change Mississippi law. We are still to apply the law as it exists. The privilege (or duty) of changing the law belongs to the Mississippi courts or legislature.[3] We

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[3] Johns-Manville and Raybestos-Manhattan, citing Judge Rubin's dissent in *Sturgeon* v. *Strachan Shipping Co.,* 731 F. 2d 255 (5th Cir.) (en banc), *cert. denied,* ___ U. S. ___, 105 S. Ct. 251, 83 L. Ed. 2d 188 (1984), urge us to reinstate the panel opinion, as Judge Rubin urged in *Sturgeon,* now that the Mississippi Supreme Court has declined certification. Given our disposition of *Jackson II,* however, the alternative urged by defendants is unavailable. In *Jackson II,* we expressly held that state tort law must govern the outcome of this case, yet the basis of *Jackson I* (the original panel opinion which defendants ask us to reinstate) was, in retro-

(Footnote Continued on Next Page)

certify questions in order to avoid having to make "unnecessary *Erie* guesses," *Thompson* v. *Johns-Manville Sales Corp.*, 714 F. 2d 581, 584 (5th Cir. 1983) (Goldberg, J., dissenting), *cert. denied*, 465 U. S. 1102, 104 S. Ct. 1598, 80 L. Ed. 2d 129 (1984) and to offer the state court the opportunity to alter existing law—in effect, to change direction. The denial of certification forces us to make the *Erie*-guess which we sought to avoid, but it does not enable us to alter existing law or to change direction. To paraphrase Judge Gee:

> In matters of [Mississippi] substantive law, our relationship to the [Mississippi] Supreme Court is all but identical to that of a [lower Mississippi] court. Indeed, if it differs at all as regards substantive innovation, it is weaker instead of stronger than that of such a court. Even in the rare case where a course of [Mississippi] decisions permits us to extrapolate or predict with assurance where that law would be had it been decided, we should perhaps—being out of the mainstream of [Mississippi] jurisprudential developments — be more chary of doing so than should an inferior state tribunal.

Rhynes v. *Branick Mfg. Corp.*, 629 F. 2d 409, 410 (5th Cir. 1980).

[3] When making an *Erie* guess in the absence of specific guidance from the Mississippi Supreme Court, our prediction of state law looks to: (1) lower state court decisions and Supreme Court dicta, (2) the lower court rul-

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spect, less Mississippi tort law than it was federal common law. *See, e.g.*, 727 F. 2d at 529-30; 750 F. 2d at 1331. *Jackson II* concluded that this is not a proper case for the application of federal common law. 750 F. 2d at 1327.

ing in this case, (3) the general rule on the issue , (4) the rule in other states looked to by Mississippi courts when they formulate the substantive law of Mississippi, and (5) other available legal sources, such as treatises and law review commentaries. *See generally Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945); 19 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4507 (hereinafter Wright & Miller, *Federal Practice*); 1A (pt. 2) J. Moore, *Moore's Federal Practice,* ¶ 0.309[2]. As Professors Wright and Miller explain:

> In vicariously creating state law . . . , the federal court may consider all available legal sources, including the Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and "the majority rule." *The federal court must keep in mind, however, thai its function is not to choose the rule that it would adopt for itself; it must choose the rule that it believes the state's highest court . . . is likely to adopt in the future.*

Wright & Miller, *Federal Practice* § 4507, at 100-03 (emphasis added). Numerous decisions of this Circuit have repeated, in some form or another, the rule of law stated by Professors Wright and Miller. For example, we recently explained that where the Mississippi Supreme Court has not expressly addressed an issue, this court "must . . . do what a lower Mississippi court would do, predict the course of the Mississippi Supreme Court. . . . In that effort, '[a]bsent evidence to the contrary, we presume that the Mississippi courts would adopt the prevailing rule if called upon to do so.'" *Turbo Trucking Company* v. *Those Underwriters at Lloyd's London,* 776 F. 2d 527, 529 (5th Cir. 1985) (quoting *Hensley* v. *E. R. Carpenter Co.,* 633 F. 2d 1106, 1109 (5th Cir. 1980)) (citation omitted) (bracket

in original). *See also Nobs Chemical, U.S.A., Inc.* v. *Koppers Co., Inc.*, 616 F. 2d 212, 214-15 (5th Cir. 1980) (looking to treatises and decisions in other states for guidance when there was no state law "directly on point").

Further, although the district court did not squarely resolve the issues we certified to the Mississippi Supreme Court and which we now confront, it did overrule defendants' objections to the jury instructions, deny their motions for directed verdict and for judgment notwithstanding the verdict, and enter judgment on the verdict in question. It therefore must be noted that we also give "special weight . . . to the determination of the district court judge who is familiar with local law." *Green*, 612 F. 2d at 214. *See also Acree* v. *Shell Oil Co.*, 721 F. 2d 524, 525 (5th Cir. 1983) ("district court's interpretation of state law will not be disturbed on appeal unless it is clearly wrong"); *Smith* v. *Mobil Corp.*, 719 F. 2d 1313, 1317 (5th Cir 1983) (reviewing court must "apply state substantive law" and extend "great weight" to legal conclusions of district judge); *Avery* v. *Maremont Corp.*, 628 F. 2d 441, 446 (5th Cir. 1980) ("[W]hen state law is uncertain, we are hesitant to second guess the federal district court judge.").

With these principles in mind, we proceed to decide the issues presented as would a Mississippi court.

II. PUNITIVE DAMAGES.

Johns-Manville ("JM") and Raybestos-Manhattan ("Raybestos"), joined by the United States as amicus, argue that punitive damages should and would be disallowed by the Mississippi Supreme Court in this case. First, JM and Raybestos[4] maintain that punitive damages are not

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[4]JM and Raybestos will be referred to collectively as "defendants."

available (or *ought* not be available),[5] as a matter of law, is cases of strict liability. Second, pointing to the specific and well-defined policy goals which punitive damages are designed to serve under Mississippi law, the defendants and the United States urge that punitive damages are not available as a matter of law in the context of a mass tort,[6] and that even if they are, the evidence was insufficient to submit the issue of punitive damages to the jury or to support the jury's verdict.

A. *Punitive Damages and Strict Liability.*

[4] The defendants point out that the Mississippi Supreme Court has not expressly held that punitive damages are available in cases of strict liability. They then contend that punitive damages would not be allowed. The defendants reason that under Mississippi law, punitive damages require a showing of intentional misconduct or gross negligence by the producer, which is conceptually inconsistent with strict liability in tort since strict liability focuses on the product, not the producer.

This argument is fundamentally flawed. The fact that a plaintiff proceeds under a theory of strict liability does not bar that plaintiff from also introducing evidence of the defendant's gross and wanton misconduct, for which the defendant, under Mississippi law, deserves punishment in the

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[5]The defendants and the United States vacillate between arguing what the Mississippi Supreme Court *would* do and what, as a matter of *national* policy, *should* be done. As indicated in Part I, *supra*, the substantive law we apply is that of Mississippi.

[6]The Appendix to Chief Judge Clark's dissent in *Jackson II* indicated that as of March, 1983, 24,000 suits had been filed claiming asbestos-related injuries. In late 1984, new suits were being docketed at a rate of 500 per month. *See* 750 F. 2d at 1336. According to JM, it has been named as a defendant in over half of these suits. *See Jackson II*, 750 F. 2d at 1323.

form of punitive damages. As Judge Higginbotham, now a member of this court, wrote as a district judge in a Texas diversity case:

> The meaning of the argument that strict liability and recovery of punitive damages are conceptually incompatible is not clear. Certainly one is said to be a no fault and the other a fault concept. . . . The bases of recovery for strict liability and exemplary damages are different. They are independent concepts. The purpose of one is compensation and the purpose of the other is deterrence. The focus of one is redistribution of loss and the focus of the other is punishment. . . . Because they are different concepts, their differences in premises and purposes are beside the point. . . .
>
> In sum, simultaneous pursuit of actual damages bottomed on principles of strict liability and exemplary damages bottomed on fault concepts are essentially matters of trial efficiency and presents no true substantive issues.

Maxey v. *Freightliner Corp.*, 450 F. Supp. 955, 961-62 (N.D. Tex. 1978), *aff'd*, 623 F. 2d 395 (5th Cir. 1980), *on reh'g*, 665 F. 2d 1367 (5th Cir. 1982), *appeal after remand*, 722 F. 2d 1238 (5th Cir.), *modified and reh'g denied*, 727 F. 2d 350 (5th Cir. 1984).

A plaintiff who elects to proceed under a strict liability theory does so merely in order to facilitate a finding of liability for compensation. *See, e.g., Jackson I*, 727 F. 2d at 511-15. It remains necessary, however, for the plaintiff to demonstrate much more before he is entitled, under Mississippi law, to punitive damages. The plaintiff must establish that the defendants' conduct was wanton, reckless, or indifferent to the rights of others. *See, e.g., Sheffield* v. *Sheffield*, 405 So. 2d 1314 (Miss. 1981); *Standard Life*

Ins. Co. of Indiana v. *Veal*, 354 So. 2d 239, 247 (Miss. 1977). As another court has noted:

> [T]here is no theoretical problem in a jury finding that a defendant is liable because of the defectiveness of a product and then judging the conduct of the defendant in order to determine whether punitive damages should be awarded on the basis of "outrageous conduct" in light of the injuries sustained by the plaintiff. . . . By dispensing with the need to prove fault for purposes of establishing liability under section 402A, the law of strict liability does not preclude consideration of "aggravated fault," if the plaintiffs can properly meet their burden of demonstrating sufficient evidence of the defendant's outrageous conduct.

Neal v. *Carey Canadian Mines Ltd.*, 548 F. Supp. 357, 378 (E.D. Pa. 1982), *aff'd*, 760 F. 2d 481 (3d Cir. 1985).

In this case, Jackson did demonstrate much more than was needed to recover compensatory damages under strict liability. *See infra* note 12. We do not believe that the Mississippi Supreme Court would regard this evidentiary showing as irrelevant, or deny Jackson the punitive damages to which the jury found him entitled on the basis of this evidence, merely because Jackson rooted his liability claim in a theory of strict liability.

Not a single Mississippi case supports the defendants' theory.[7] On the contrary, virtually every court to have

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[7]We are not unmindful of authorities cited by defendants which are alleged to support the rationale of their theory. These cases include: *Gold* v. *Johns-Manville Sales Corp.*, 553 F. Supp. 482 (D.N.J. 1982); *Butcher* v. *Robertshaw Controls Co.*, 550 F. Supp. 692, 705 (D. Md. 1981); *Sanford* v. *Celotex Corp.*, 598 F. Supp. 529 (M.D. Tenn. 1984); *Rimlinger* v. *Johns-Manville*, (unpublished slip op., Cir. Ct. Tenn., January 13, 1982); *In re No.*

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Dist. of Cal. "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F. 2d 847 (9th Cir. 1982), *cert. denied*, 459 U. S. 1171, 103 S. Ct. 817, 74 L. Ed. 2d 1015 (1983). In addition, the panel in *Jackson I* cited *Walbrun* v. *Berkel, Inc.*, 433 F. Supp. 384 (E.D. Wisc. 1976). *Jackson I*, 727 F. 2d at 529. Contrary to the defendants' assertions, these cases do not uniformly stand for the proposition that punitive damages are not permitted in cases where liability is predicated on strict liability in tort.

For example, *Walbrun* held that punitive damages are not available in Wisconsin in cases of strict liability, but the court based its holding on the fact that punitive damages are not available generally in Wisconsin even in cases of gross negligence. In this respect, Mississippi law could not be more different from that of Wisconsin. In addition, a different district court in Wisconsin held precisely the opposite, ruling that punitive damages are recoverable in a products liability case where the plaintiff shows the defendant's conduct to have been wanton or reckless. *See Drake* v. *Wham-O Manufacturing Co.*, 373 F. Supp. 608 (E.D. Wisc. 1974). Finally, the Wisconsin Supreme Court effectively overruled *Walbrun* in *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N. W. 2d 437 (1980). *See also Klawes* v. *Firestone Tire & Rubber Co.*, 572 F. Supp. 116 (E.D. Wisc. 1983); *Simmons* v. *Atlas Vac Machines Co.*, 475 F. Supp. 1181 (E.D. Wisc. 1979).

Gold is no longer followed in the federal district court in New Jersey, *Gogol* v. *Johns-Manville Sales Corp.*, 595 F. Supp. 971, 975-76 (D.N.J. 1984), due to a New Jersey appeals court's rejection of *Gold's* holding.

In *Butcher*, the district court, applying Maryland law, did permit punitive damages on a claim of negligence because the plaintiffs had alleged, with respect to that claim, that the defendants' conduct had been reckless and indifferent to the rights of others. The court then indicated that punitive damages were not recoverable under strict liability precisely because plaintiffs could recover under that theory *without* having to demonstrate reckless indifference, that demonstration would be made in connection with the negligence claim. There is certainly no suggestion

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considered this matter has ruled that punitive damages *are* permissible in strict liability cases. For example, the following decisions have permitted punitive damage awards in strict liability, asbestos-related cases: *Johns-Manville Sales Corp.* v. *Janssens*, 462 So. 2d 242 (Fla. App. 1984), *review denied*, 467 So. 2d 999 (Fla. 1985); *Froud* v. *Celotex Corp.*, 107 Ill. App. 3d 654, 63 Ill. Dec. 261, 437 N.E. 2d

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in *Butcher* that a strict liability plaintiff who *also* proves that the defendant acted with reckless indifference would be barred from collecting punitive damages merely because the plaintiff established liability on the basis of strict liability in tort. *See* 550 F. Supp. at 704.05.

The continued vitality of *Sanford* is, to say the least, doubtful following the Sixth Circuit's opinion in *Cathey* v. *Johns-Manville Sales Corp.*, 776 F. 2d 1565 (6th Cir. 1985), which decided that Tennessee law permits an award of punitive damages in a strict products liability action. In *Rimlinger*, the First Circuit Court for Davidson County, Tennessee, did conclude that "punitive damages are inappropriate as inconsistent with the theory of [strict liability in tort], and [that] insofar as this case is based upon negligence . . . the multitude of pending product liability actions serve as sufficient deterents [sic] and punishment for willful or gross negligence." We have found no other case, however, in Tennessee, in any other state court, or in any federal court, which cites or relies upon *Rimlinger*. In addition, the language in *Rimlinger* suggests that the court was concerned exclusively with the deterrent effect of punitive damages on the *defendant*, in that case Johns-Manville. The Sixth Circuit in *Cathey* rejected such a narrow reading of Tennessee law, noting that general as well as specific deterrence of wrongdoing is a purpose of punitive damages in Tennessee. 776 F. 2d at 1570. In any event, the law in Mississippi takes into account both deterrent functions. *See, e.g., Veal*, 354 So. 2d at 247.

In the *Dalkon Shield* case, a federal district court in California rightly noted that the "law on punitive damages was created in an era of single plaintiff versus single defendant disputes and has not yet been adapted to the complexity of multi-party litigation."

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910 (1982), *rev'd on other grounds*, 98 Ill. 2d 324, 74 Ill. Dec. 629, 456 N.E. 2d 131 (1983); *Brotherton* v. *Celotex Corp.*, 202 N.J. Super. 148, 493 A. 2d 1337 (1985); *Moran* v. *Johns-Manville Sales Corp.*, 691 F. 2d 811 (6th Cir. 1982) (Ohio law); *Thiry* v. *Armstrong World Industries*, 661 P. 2d 515 (Okla. 1983); *Martin* v. *Johns-Manville Corp.*, 322 Pa. Super. 348, 469 A. 2d 655 (1983), *vacated on other grounds*, 494 A. 2d 1088 (Pa. 1985); *Cathey* v. *Johns-Manville Sales Corp.*, 776 F. 2d 1565, 1569 (6th Cir. 1985) (applying Tennessee law). A New Jersey state court, considering precisely those issues before us now, concluded that in *every* jurisdiction where the argument that punitive damages are incompatible with strict liability had been raised, it was decided that punitive damages are in fact permitted. *Fischer* v. *Johns-Manville Corp.*, 193 N. J. Super. 113, 472 A. 2d 577, 582-83 (App. Div.), *certif. granted*, 97 N.J. 598, 483 A. 2d 137 (1984). *See also* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1269-71 (1976) (use of punitive damages in strict liability cases is "established," and "there is no sound reason for not allowing a plaintiff seeking punitive damages to show a greater culpability for that purpose than he must for his underlying theory of compensatory liability"). Given the principles which guide our inquiry, *see supra* Part I, it is germane "that the Hawaii, Indiana, Missouri, Pennsylvania, South Carolina, Tennessee and Virgin Island cases all reflect the prediction by federal courts in diversity actions that the state whose law governed and which had not yet itself addressed the issues would permit punitive damages

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526 F. Supp. at 900. However, the court had no doubt that punitive damages were available "in the products liability context"; indeed, the court attempted to make them manageable by certifying the case, upon application by the defendants, as a class action. 526 F. Supp. at 900.

in products liability actions." *Id.* at 583.[8] We must assume that a Mississippi court would follow this rule that prevails by an overwhelming margin.

The position urged by the defendants would represent a significant development in principles of tort law. To carve out a strict liability exception to punitive damages would be to make new Mississippi law. That is not our role as a diversity court.

B. Punitive Damages in the Mass Tort Case.

The defendants attempted at two different points in the trial to convince the district court that this case was not appropriate for an award of punitive damages. First, pursuant to Fed. R. Civ. P. 51, they objected to any jury instruction on punitive damages as a matter of policy, con-

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[8]Courts which have been called upon to address the issue of whether punitive damages are available in cases of strict liability have almost uniformly held that punitive damages are available. In addition to the cases cited in the text, *see, e.g., Palmer* v. *A. H. Robins Co.*, 684 P. 2d 187 (Colo. 1984) (en banc); *American Laundry Machinery Industries* v. *Horan*, 45 Md. App. 97, 412 A. 2d 407 (1980); *Campus Sweater & Sportswear Co.* v. *M. B. Kahn Construction Co.*, 515 F. Supp. 64 (D.S.C. 1979), *aff'd*, 644 F. 2d 877 (4th Cir. 1981); *Maxey* v. *Freightliner Corp.*, 450 F. Supp. 955 (N.D. Tex. 1978), *aff'd*, 623 F. 2d 395 (5th Cir. 1980), *on reh'g*, 665 F. 2d 1367 (5th Cir. 1982), *appeal after remand*, 722 F. 2d 1238 (5th Cir. 1984), *modified and reh'g denied*, 727 F. 2d 350 (5th Cir. 1984); *Sturm, Ruger & Co., Inc.* v. *Day*, 594 P. 2d 38 (Alaska 1979), *modified*, 615 P. 2d 621 (Alaska 1980), *on reh'g*, 627 P. 2d 204 (Alaska), *cert. denied*, 454 U. S. 894, 102 S. Ct. 391, 70 L. Ed. 2d 209 (1981); *Unified School District No. 490* v. *Celotex Corp.*, 629 P. 2d 196, 6 Kan. App. 2d 346 (1981); *Grye* v. *Dayton-Hudson Corp.*, 297 N. W. 2d 727 (Minn.), *cert. denied*, 449 U. S. 921, 101 S. Ct. 320, 66 L. Ed. 2d 149 (1980); *Rinker* v. *Ford Motor Co.*, 567 S. W. 2d 655 (Mo. App. 1978); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N. W. 2d 437 (1980); *Acosta* v. *Honda Motor Co., Ltd.* 717 F. 2d 828 (3d Cir. 1983) (Virgin Islands law).

tending that punitive damages should not be available in a "mass tort" product liability action. Further, they contended that even if punitive damages might be available as a matter of law, the evidence in this case was insufficient to entitle the plaintiff to have the issue submitted to the jury. The trial judge overruled the objections. Second, after the jury awarded the plaintiff punitive damages, the defendants moved for a judgment notwithstanding the verdict or for a new trial, Fed. R. Civ. P. 50, simply repeating their policy argument that punitive damages should not be available in a mass tort case as a matter of law— the same argument which had already been rejected by the district judge. The district judge again rejected the defendants' argument, and denied the motion. We conclude that the district judge properly overruled the defendants' objections to the punitive damages instruction, and that the defendants were not entitled to a judgment notwithstanding the verdict or a new trial. The trial court properly declined the defendants' invitation to construe the law of Mississippi to prevent an award of punitive damages in a mass tort case as a matter of law. Further the evidence introduced at trial was sufficient to allow the issue of punitive damages to go to the jury and fully supports the jury's award.

1. *Availability of Punitive Damages in a Mass Tort Case as a Matter of Law.*

The defendants argued before the instructions were given that the punitive damages issue should not go to the jury as a matter of law, and, after failing in that, they contended that the punitive damages award should be vacated. The defendants offered the identical legal theory in support of their objections to the jury instruction on both occasions: The uniqueness of the factual context in a mass tort case makes punitive damages inappropriate as a matter of law. As in any appeal involving a challenge to

the accuracy on sufficiency of jury instructions as a matter of law, the question that we review is whether the jury instructions were a fair and accurate description of Mississippi law on punitive damages, or whether the defendants' objection to the instructions pursuant to Fed. R. Civ. P. 51 should have been upheld. *Bass* v. *International Brotherhood of Boilermakers,* 630 F. 2d 1058, 1062 (5th Cir. 1980) (role of court reviewing legal sufficiency of jury instructions in diversity case is to examine applicable state law); *Rohner, Gehrig & Co.* v. *Capital City Bank,* 655 F. 2d 571, 580 (5th Cir. 1981) (in reviewing claim of error of law in jury instructions in diversity case, court evaluates accuracy of substance of charge under controlling state law); *see generally* 5A *Moore's Federal Practice* ¶ 51.06 (no reversible error if jury is given full statement of applicable law).[9]

The defendants cite no Mississippi cases to support their contention that punitive damages are unavailable in what they state is a mass tort case.[10]. The defendants have

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[9]A motion made under Fed. R. Civ. 50, whether it be a motion for a directed verdict or a motion for judgment notwithstanding the verdict, should not be used to test the legal sufficiency of jury instructions. Rather, a Rule 50 motion is appropriate to allege "a complete absence of pleading or proof on an issue or issues material to the cause of action or defense," or "where there are no controverted issues of fact upon which reasonable men could differ." 5A *Moore's Federal Practice* ¶50.02[1], at 50-16. *See generally Sulmeyer* v. *Coca-Cola Co.,* 515 F. 2d 835, 841 (5th Cir. 1975), *cert. denied,* 424 U. S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 341 (1976); *Boeing Co.* v. *Shipman,* 411 F. 2d 365, 374 (5th Cir. 1969) (en banc).

[10]Even assuming that the defendants' argument might have a reasonable basis in the law, it seems unlikely that their contention could prevail because they did not offer to the district judge any factual support for their argument. Rather, the district judge had before him only the unsworn allegations of counsel concerning the

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not refered to any Mississippi decision which has even swayed in the direction of changing the rules in a mass tort case. In terms of suggesting how a Mississippi court would view their policy argument that is clearly at odds with settled tort principles, the defendants' silence is conspicuous and enlightening.

The focus of the defendants' argument is that the policies justifying punitive damages in Mississippi are not implicated in the mass tort case. They conclude that punitive damages should therefore be unavailable as a matter of law. The defendants note correctly that under Mississippi law, plaintiffs have no "right" to recover punitive damages. *See, e.g., Tideway Oil Programs, Inc.* v. *Serio*, 431 So. 2d 454, 461 (Miss. 1983). Rather, punitive damages are granted only in "extreme" cases, *Snowden* v. *Osborne*, 269 So. 2d 858, 860 (Miss. 1972), and they "should be allowed

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impact of punitive damage awards on future compensatory damage awards. There is simply no proof in this record that punitive damages awards may impair the defendants' ability to pay compensatory damages awards in the future. JM did state in an affidavit submitted to the district judge (not included in the evidence at trial) that as of 1983, it had been held liable for punitive damages to fifteen different plaintiffs. However, before the district court, the defendants acknowledged in oral argument on their Rule 51 motion "that no punitive damage awards have been paid to date." 55 Record at 2288, 2290. The defendants did not offer any evidence that any punitive damage awards have been paid, or that the recovery of compensatory damage awards by other asbestos victims is being threatened by punitive damage awards. Even with respect to their most basic argument, then, the defendants have provided no factual predicate for a favorable ruling. *See generally* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L.R. 37, 39 & n. 11 (1983); *see also* Brief for United States at 15 (stating that by 1982, JM had been assessed $6.1 million in punitive damages in favor of 18 plaintiffs).

only with caution and within narrow limits," *Standard Life Ins. Co. of Indiana* v. *Veal,* 354 So. 2d 239, 247 (Miss. 1977). The law authorizes punitive damage awards somewhat reluctantly, because they alter the settled principle that a remedy in tort should simply make the plaintiff whole. However, greater societal concerns justify punitive damages in the exceptional case, because in extreme circumstances wrongdoers deserve punishment both as an expression of society's disfavor of their actions "and as an example so that others may be deterred from the commission of similar offenses." *Snowden,* 269 So. 2d at 860. Further, punitive damages reward individuals who serve as "private attorneys general" in bringing wrongdoers to account. *Veal,* 354 So. 2d at 247. *Cf. Smith* v. *Wade,* 461 U. S. 30, 103 S. Ct. 1625, 1639, 75 L. Ed. 2d 632 (1983) (discussing purposes of punitive damages); *Restatement (Second) of Torts* § 908(1) (exemplary damages punish outrageous conduct and deter actor and others from similar conduct in future).

Given these specific functions which punitive damages serve, the defendants and the United States insist that the Mississippi Supreme Court would not allow them here. As JM sums up Mississippi law:

> Mississippi courts . . . neither regard punitive damages as a right to which plaintiffs are entitled [citing *Tideway*] nor demonstrate such a callous disregard for the results of punitive damages which result in the financial destruction of a defendant [citing *T.C.L. Inc.* v. *Lacoste,* 431 So. 2d 918 (Miss. 1983)]. Rather, the Mississippi courts have recognized a duty for both trial and appellate courts to scrutinize carefully all punitive damages cases to be sure that societal interests are served and that punitive damages are not awarded except in the most extreme cases where the

> plaintiff is not motivated by vindictiveness, reprisal, or greed.

JM's Brief Following Denial of Certification at 15-16 (hereinafter "JM's brief").

The defendants' counsel asserted to the trial judge that punitive damages should not be awarded since multiple punitive damage awards might preclude future plaintiffs from recovering even compensatory damages.[11] They pointed out to the trial judge that punitive damages serve to punish defendants, and contended that, as a result of the voluminous asbestos litigation, they have already been punished enough. They stated to the trial judge that punitive damages serve to motivate "private attorneys general" to bring suit, but argued that persons injured by asbestos have motivation enough to sue. Finally, they acknowledged to the trial judge that punitive damages deter wrongful conduct, but they insisted that the asbestos litigation is deterrence enough.

The defendants' analysis neglects to pay any attention to the heavy burden the plaintiff must meet—and, as we indicate *infra*, the burden Jackson *did* meet—before the

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[11]Although the defendants argue that the claims of future plaintiffs may be endangered as a result of the number of suits involving them, they do not indicate why their ability to pay future damage awards will be more affected by punitive damage awards than by the multiplicity of compensatory damage awards. Other courts have found "that the threat of insolvency from payment of punitive damages was greatly exaggerated," *Brotherton* v. *Celotex Corp.*, 202 N. J. Super. 148, 493 A. 2d 1337, 1344 (1985) (citing *Fischer* v. *Johns-Manville Corp.*, 193 N. J. Super. 113, 472 A. 2d 577 (App. Div.), *certif. granted*, 97 N. J. 598, 483 A. 2d 137 (1984). In addition, one court has found that, "[w]ith respect to Johns-Manville, it is clear that its present insolvency proceedings are primarily attributable to its exposure to compensatory rather than punitive damages." *Fischer*, 472 A. 2d at 586.

punitive damage issue may properly be submitted to the jury and punitive damages may be awarded. That heavy burden is designed to take into account the interests of both society and defendants by ensuring that punitive damages are awarded in only the unusual case where the defendant must be made an example because of its especially egregious behavior.

In Mississippi, a jury may award punitive damages only if the plaintiff succeeds in demonstrating that the defendant was grossly negligent or that the defendant's conduct was especially opprobrious, *see, e.g., Commodore Corp.* v. *Bailey,* 393 So. 2d 467 (Miss. 1981); *Sheffield* v, *Sheffield,* 405 So. 2d 1314 (Miss. 1981), or if it finds that the defendant's behavior exhibited "gross disregard" for the rights of the plaintiff. *National Mortgage Co.* v. *Williams,* 357 So. 2d 934 (Miss. 1978). In *Veal,* the leading case on punitive damages, the Mississippi Supreme Court "recognize[d] that punitive damages are assessed as an example and warning to others and should be allowed only with caution and within narrow limits." 354 So. 2d at 247. Then, before examining whether "the evidence support[s] an award for punitive damages," the court made plain that " '[p]unitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such wrong.' " 354 So. 2d at 247 (quoting *Seals* v. *St. Regis Paper Co.,* 236 So. 2d 388, 392 (Miss. 1970)). In this case, the district court's charge to the jury clearly and accurately instructed that punitive damages could be returned only if the jury believed that the requisite misconduct had been demonstrated.[12]

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[12]The district court's charge instructed the jury as follows:

> If you should find from a preponderance of the evidence in this case that the plaintiff is entitled to a verdict for actual

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> or compensatory damages, against one or more of the defendants herein, and further find that the act or omission of that particular defendant or defendants against whom you do find, which proximately caused actual injury or damages to the plaintiff was maliciously or wantonly done by that particular defendant or defendants, then in that event you may, if in the exercise of your discretion you unanimously choose to do so, add to the award of actual damages such amount as you shall unanimously agree to be proper, as punitive and exemplary damages against any one or more of the defendants against whom who have found liability and actual damages in favor of the plaintiff, if any.

56 Record at 2451.

The district court defined a "malicious act" as one prompted or accompanied by ill-will, spite, or grudge; it defined "wanton act" as one done in reckless or callous disregard of, or with indifference to, the rights of the plaintiff. *Id.* Before the jury could return punitive damages, the district court repeated that the jurors must "unanimously find, from a preponderance of the evidence in this case, that a particular defendant's act or omission, which proximately caused [actual] damage to the plaintiff, was maliciously or wantonly done." 56 Record at 2452.

One court, apparently having viewed evidence similar to that in the record of this case, concluded that ". . . there is voluminous evidence that the asbestos industries have known for decades of the dangers involved in the use of asbestos products." *Johns-Manville Sales Corp.* v. *Janssens,* 463 So. 2d 242, 249 n. 5 (Fla. App. 1984), *review denied,* 467 So. 2d 999 (Fla. 1985). JM apparently had a policy of not telling its workers whom company officials knew to have asbestosis that they in fact had asbestosis. Perhaps this was deemed by the jury to have been a policy that was recklessly indifferent. *See, e.g.,* 49 Record at 417, 582; *see also* Deposition of Wibur Ruff. The jury might also have concluded that the asbestos companies' practice of directing their doctors not to participate in programs devoted to learning the association between asbestos and lung-related disease reflected malicious behavior or reckless indifference to the rights of those workers who would be around

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Yet the defendants do not directly contend that the jury instructions inadequately or incorrectly summarized the existing legal rules, which is the usual issue in a Rule 51 objection to jury instructions. *See Bass,* 630 F. 2d at 1062. They argue instead that "facts" not a part of this record mandate a drastic change in the law of remedies. They urge us to determine that when a defendant injures tens of thousands and manifests reckless disregard for the victims' lives and welfare, punitive damages should be unavailable as a matter of law.

We believe that the Mississippi Supreme Court would not deny to its own citizens the right to recover that which citizens of dozens of other states are already entitled to recover, and that the district court correctly charged the jury on the applicable legal principles. As Chief Judge Clark, dissenting in *Jackson II,* noted: "Despite the absence of clear controlling state court precedent as to whether punitive damages should be available in product liability actions . . ., *there can be no doubt that the Supreme Court of Mississippi would hold that Mississippi citizens should not be denied the right to claim punitive damage awards and to seek recovery for probable future diseases . . . now*

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asbestos. *See, e.g.,* Testimony of Dr. Nicholas Demy, 51 Record at 1137; *see generally* 50 Record at 800-16. Finally, the Sumner Simpson papers, one of which consisted of a letter from the President of Raybestos to the legal director of JM suggesting that "the less said about asbestos the better off we are," might have been regarded by the jury as reckless, indifferent, or even malicious behavior. (Or perhaps the jury was more outraged by the response to this letter from the legal director of JM. He wrote: "I quite agree that our interests are best served by having asbestosis receive the minimum amount of publicity.") *See* Closing Argument of Jackson's Counsel, 55 Record 2300-2333, 2398-2400; 56 Record 2401-2419, esp. 2410-11.

accorded to citizens in other states." 750 F. 2d at 1334 (emphasis added).

There appears to be no Mississippi case law directly on the issue of the availability of punitive damages in the mass tort context. Absent the controlling authority of the Mississippi Supreme Court or the guiding authority of lower Mississippi courts, we must look to the jurisprudence of other states in formulating substantive law, as a Mississippi court would. *See, e.g., Hall* v. *Hilbun,* 466 So. 2d 856 (Miss. 1985) (examining development of medical malpractice principles in other states); *Lucas* v. *Mississippi Housing Authority No. 8,* 441 So. 2d 101, 106-07 (Miss. 1983) (Walker, J., specially concurring) (reviewing negligence laws of numerous states).

The simple fact of the matter is that no appellate court has accepted the defendants' theory in a reported decision. In Oregon, for example, the Supreme Court recently ruled in a "mass tort" case that the "financial interests of the malicious and wanton wrongdoer must be considered in the context of societal concern for the injured and the future protection of society." *State ex rel. Young* v. *Crookham,* 290 Or. 61, 618 P. 2d 1268, 1271 (1980). An Illinois court recently explained that it did "not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons." *Froud* v. *Celotex Corp.,* 107 Ill. App. 3d 654, 63 Ill. Dec. 261, 264, 437 N.E. 2d 910, 913 (1982), *rev'd on other grounds,* 98 Ill. 2d 324, 74 Ill. Dec. 629, 456 N.E. 2d 131 (1983). Pennsylvania, New Jersey,[13] Florida, Tennessee,

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[13]There is a contrary decision in New Jersey, a federal district court decision attempting to predict state law, to which defendants frequently refer. *Gold* v. *Johns-Manville Sales Corp.,* 553 F. Supp. 482 (D.N.J. 1982). We note, however, that New Jersey state and

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and Texas each permits plaintiffs to recover punitive damages in mass tort cases. *Martin* v. *Johns-Manville Corp.*, 322 Pa. Super. 348, 469 A. 2d 655 (1983), *vacated on other grounds*, 494 A. 2d 1088 (Pa. 1985); *Fischer* v. *Johns-Manville Corp.*, 193 N.J. Super. 113, 472 A. 2d 577 (App. Div.), *certif. granted*, 97 N.J. 598, 483 A. 2d 137 (1984); *Brotherton* v. *Celotex Corp.*, 202 N.J. Super. 148, 493 A. 2d 1337 (1985); *Celotex Corp.* v. *Pickett*, 459 So. 2d 375 (Fla. App. 1984); *Cathey* v. *Johns-Manville Sales Corp.*, 776 F. 2d 1565, (1985) (applying Tennessee law); *Hansen* v. *Johns-Manville Products Corp.*, 734 F. 2d 1036 (5th Cir. 1984) (applying Texas law), *cert. denied*, ____ U. S. ____, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985).

Moreover, several commentators writing on the issue of punitive damages in mass tort cases have concluded that punitive damages should be generally available in mass tort cases. *See, e.g.*, Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258 (1976); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); Note, *In Defense of Punitive Damages*, 55 N.Y.U.L. Rev. 303 (1980). The central thesis of much of the scholarly writing in this area is that the problems assertedly caused by awarding punitive damages in the mass tort-context are typically more apparent than real.

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federal courts have ruled differently and have declined to follow *Gold*. The New Jersey court which decided *Fischer*, 193 N. J. Super. 113, 472 A. 2d 577, persuasively argues that the federal district court in *Gold* erroneously predicted what the New Jersey Supreme Court will do. 472 A. 2d at 583-84. Moreover, a recent federal court decision in New Jersey expressly rejected *Gold* in light of *Fischer*, *Gogol* v. *Johns-Manville Sales Corp.*, 595 F. Supp. 971, 975-76 (D.N.J. 1984).

Further, in response to the speculation that punitive damage awards may prevent compensatory damage awards in the future due to financial pressures on the defendants, these authors conclude that if serious societal difficulties do *in fact* arise, they can be addressed by less drastic means than a complete bar to the availability of punitive damages as a matter of law.

The rule of law requested by the defendants would require a modification of Mississippi's approach to fashioning its substantive law, as well as a modification of the law itself. For this court to make such a modification in the absence of explicit guidance from the Mississippi courts would be to abdicate our proper role as a diversity court. As the Sixth Circuit concluded in a recent diversity case applying Tennessee law, the "serious public policy concerns" raised by asbestos case defendants seeking to avoid punitive damages were not "a proper basis upon which this Court can rest a diversity decision. . . . The relief sought by JM may be more properly granted by the state or federal legislature than by this Court." *Cathey* v. *Johns-Manville Sales Corp.*, 776 F. 2d 1565, 1569-70 (6th Cir. 1985).

Our duty is to apply the law of Mississippi as it exists. We act as an intermediate Mississippi court in this case; we cannot blaze new trails in Mississippi law or set forth rules that find no application in Mississippi jurisprudence. That responsibility lies with the Mississippi Supreme Court. That court has not evinced any affinity for the defendants' theory, nor has any other Mississippi court. The trial judge in this case, whose interpretation of Mississippi law we must accord some deference, rejected the defendants' arguments. Virtually every court to have decided this mass tort issue—including state courts as well as federal

courts applying state law in diversity actions--has permitted the imposition of punitive damages.[14]

The defendants and the United States contend nevertheless that regardless of existing Mississippi law, punitive damages should not be awarded in this context, where there have been thousands of persons injured by asbestos and where thousands of plaintiffs have sued, since the potential ramifications of multiple damage awards on the defendants' financial viability may be severe, with the consequence that future plaintiffs may be unable to recover even compensatory damages.[15] JM's position is that in "the asbestos litigation, punitive damages . . . carry the very real prospect of financial destruction for the defendant [and] threaten the possible recovery of thousands of other injured parties." JM's brief at 8. Similarly, the United States acknowledges that the "defendants' conduct would clearly warrant the lower court's punitive damage sanction if the

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[14]Like many other plaintiffs in diversity cases filed in federal courts, the appellant here is asking that we anticipate the birth of a state law doctrine in the "womb of time, but whose birth is distant." We have been asked to deliver prematurely a new doctrine of Pennsylvania tort law, and as a federal court we are unwilling to do so.

Vargus v. *Pitman Mfg. Co.*, 675 F. 2d 73, 76 (3d Cir. 1982) (citation and footnote omitted). Unlike the tort law theory proposed in *Vargus*, that proposed by the defendants in this case is not even visible in the womb of time. We refuse to clone their theory into Mississippi law.

[15]The defendants argue that *no* plaintiff in a mass tort case should be able to recover punitive damages. They do not contend that punitive damages should be available only to the first plaintiffs who bring actions in mass tort cases. One rationale for punitive damages, as noted above, is that injured individuals should be encouraged to act as private attorneys general. That interest would seem to be a particularly compelling factor supporting punitive damages for Jackson, one of the first Mississippi plaintiffs to prosecute a case of this nature.

full scope of the asbestos litigation were ignored, [but] the justifiable outrage at defendant's conduct should not permit a damage award that in fact runs counter to the public interest." Brief for the United States at 3.

There is a fundamental inconsistency within this argument, an inconsistency which many other courts have pointed out and have ultimately found to be dispositive. Punitive damages exist in part to punish defendants whose conduct merits punishment. As the defendants repeatedly point out, punitive damages are awarded only in extreme cases. *See, e.g., Snowden,* 269 So. 2d at 860. Yet the defendants and the United States argue that in the *most* extreme cases, when a defendant commits an especially pernicious act which injures a myriad of innocent persons, cases which one might imagine to be especially suitable for the imposition of punitive damages, the law should shield the defendant from punitive damages by the sheer magnitude of its wrong.

Mississippi law already provides that the defendants could have introduced to the jury evidence of their asserted dire financial straits, and of the possibility that punitive damage awards might prevent other plaintiffs from recovering even compensatory damages. *See infra* at II.B.2. They could have attempted to convince the finder of fact that they did not need to be deterred, or that the effect of punitive damage awards would cripple their companies. They could have produced evidence of their contingent liability and then requested that the trial judge specifically instruct the jury that this evidence be taken into account in assessing the amount of punitive damages, if any. If the defendants had done so, the finder of fact could have assessed the merits of their contentions. Thereafter, the trial judge could have reviewed the propriety of the award, in light of the evidence supporting the defendants' contentions, on either a motion for judgment notwithstanding the ver-

dict, Fed. R. Civ. P. 50(b), *see Boeing Co.* v. *Shipman*, 411 F. 2d 365 (5th Cir. 1969) (en banc), or a motion to remit the punitive damages, *see Lowe* v. *General Motors Corp.*, 624 F. 2d 1373, 1383 (5th Cir. 1980) ("District Courts have not hesitated to remit even punitive damages"); *Gilbert* v. *St. Louis—San Francisco Railroad Co.*, 514 F. 2d 1277, 1280-81 (5th Cir. 1975). However, the defendants did not elect to follow the path which was available to them under existing law to bring their concerns about insolvency and the lack of need for deterrence to the attention first of the finder of fact and then to the judge.[16]

[5] There is no basis for us to disturb the trial court's decision that punitive damages are available as a matter of law in mass tort contexts. We conclude that the Mississippi Supreme Court would not deny punitive damages in cases of strict liability or cases of mass tort as a matter of law.

2. *Sufficiency of Evidence for Punitive Damages Instruction.*

In addition to arguing to the trial judge that the punitive damages issue should not go to the jury as a matter of public policy, the defendants contended in passing that the evidence introduced by the plaintiff could not lead reasonable jurors to conclude that their conduct in fact warranted punitive damages. Therefore, they moved under Rule 50 for a directed verdict on the issue, and for a verdict notwithstanding the judgment after the jury's adverse decision.

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[16]We fully recognize the difficulties presented to the defendants in having to put before the jury evidence of an enormous volume of litigation similar to this case and of their actual or potential insolvency resulting therefrom. This situation is one in which the trial court should consider the possibility of a separate trial on punitive damages under Fed. R. Civ. P. 42(b) after the issues of liability and compensatory damages have been decided.

[6] Our review of a challenge to the appropriateness of an award of punitive damages in light of the evidence *in this record* is limited to the question of whether the testimony and evidence could reasonably justify the imposition of punitive damages. *See Boeing Co.* v. *Shipman*, 411 F. 2d 365, 374-75 (5th Cir. 1969) (en banc).[17] In this case, the threshold issue is whether reasonable jurors could have concluded that the defendants' behavior was so malicious or grossly indifferent as to warrant punitive damages under Mississippi law. *Id.; Maxey* v. *Freightliner Corp.*, 665 F. 2d 1367, 1374 (5th Cir. 1982) (en banc), *appeal after remand*, 722 F. 2d 1238 (5th Cir.), *modified and reh'g denied*, 727 F. 2d 350 (5th Cir. 1984). In addressing this issue, we must consider all the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Boeing*, 411 F. 2d at 374. "[I]f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-

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[17]In reviewing whether the record supports punitive damages, we apply Mississippi substantive law, but a federal standard of review governed by *Boeing*. *See Maxey* v. *Freightliner Corp.*, 665 F. 2d 1367, 1374 n. 7 (5th Cir. 1982) (en banc), *appeal after remand*, 722 F. 2d 1238 (5th Cir. 1984), *modified and reh'g denied*, 727 F. 2d 350 (5th Cir. 1984); *Foster* v. *Ford Motor Co.*, 616 F. 2d 1304, 1309 n. 10 (5th Cir. 1980). We note, however, that the standard of review with respect to a jury award of punitive damages appears to be the same under Mississippi procedural law as under federal law. *See, e.g., West Cash & Carry Building Materials* v. *Palumbo*, 371 So. 2d 873 (Miss. 1979); *Horton* v. *Brooks*, 325 So. 2d 912 (Miss. 1976); *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Campbell*, 466 So. 2d 833 (Miss. 1985). Furthermore, in reviewing punitive damage awards, the Mississippi Supreme Court, which has "expressed a great reluctance" to interfere with "punitive damages assessment[s] made by a jury," inquires into "whether the proof is sufficient to sustain an assessment of punitive damages." *Gardner* v. *Jones*, 464 So. 2d 1144, 1150 n. 5 (Miss. 1985).

minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." *Id.* at 374-75.

[7] Reviewing the record in the light most favorable to the plaintiff leaves no room for doubt that the jury had an adequate basis for concluding that the defendants had shown gross disregard for Jackson's rights and that Jackson was therefore entitled to punitive damages.[18]

As a matter of substantive Mississippi law, the financial condition of the defendant must be taken into account by the jury when it sets a punitive damage award, and by an appellate court when it reviews the award. *See e.g., T.C.L., Inc.* v. *Lacoste,* 431 So. 2d 918, 923 (Miss. 1983) (punitive damage award set aside because "[t]he proof in the case sub judice failed to adequately establish the net worth of appellants to such an extent as to serve as a measure of the correctness of the punitive damages award"); *First American Nat'l Bank of Iuka* v. *Mitchell,* 359 So. 2d 1376, 1381 (Miss. 1978) ("Absent some proper showing of the net worth or financial condition of [the defendant], we have no way to measure the correctness of the punitive damage award."). The Mississippi Supreme Court has recently explained:

> Once it is established that punitive damages in some amount should be allowed, the quantum thereof is determined by reference to certain general factors which include: (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future . . .; (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses . . .;

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[18] *See supra* note 12.

> and (3) The pecuniary ability or financial worth of the defendant . . . . [T]he determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.

Bankers Life and Casualty Co. v. *Crenshaw*, ____ So. 2d ____, ____ (Miss. 1985).

[8, 9] Nevertheless, the defendants chose not to put on evidence before the jury and not to argue to the jury that they are financially imperiled, whether due to the asbestos litigation or for another reason. Notably, the only evidence on the defendants' financial condition was introduced by the plaintiff. This evidence, introduced by way of the companies' annual reports, could easily be interpreted to show that both JM and Raybestos are relatively healthy companies. *See* Plaintiff's Exhibit P-1232; 55 Record at 2295-96. The evidence showed that in 1980, JM had a net worth of over $2.3 billion and net earnings of over $80 million, and Raybestos had a net worth of nearly $50 million. *Id.* This evidence was uncontroverted. At no time did the defendants claim that the plaintiff's evidence exaggerated their financial worth, or that the evidence failed to reflect the impact that the asbestos litigation may have on their worth. They elected to let the opportunity to introduce evidence on their financial condition pass by. The defendants may be correct that the fact that this case is one of thousands should have some impact on the punitive damages awarded against them, but that is an argument which should have been made to the jury, the body responsible for assessing punitive damages in the first instance. Therefore, the only evidence on the defendants' financial condition that we may consider in our *Boeing* analysis is that introduced by the plaintiff. Under these circumstances, the punitive damage award against the defendants was not unreasonable in light of the net worth of the defendants.

We note briefly that JM's strategy during closing argument was to insist that "we did [not do] anything wrong." 55 Record at 2386, rather than to contend that punitive damages were inappropriate because of its asserted financial difficulties. JM argued that "for more than a hundred years, [JM has been] a responsible member of the business community." *Id.* at 2397; *see generally* 55 Record at 2365-2397. The strategy of Raybestos mirrored that of JM. Although counsel for Raybestos stated during closing argument that in 1980 Raybestos "lost more than six million dollars," the strategy was not to portray Raybestos as an ailing company, but as a model corporate citizen: a company which "spent millions, and millions, and millions of dollars in working [on] safety." 55 Record at 2856. Raybestos asked the jury to let Jackson know "that here in Mississippi we don't punish individuals and companies who are good citizens and who have contributed to our safety and well-being." *Id.; see generally* 55 Record at 2334-2357.

The jury rejected the defendants' arguments, and found that Jackson met his burden of introducing evidence that the defendants' misconduct was so egregious that punitive damages should be assessed against them. The question for the district court at that point was solely whether the facts of the case justified the verdict under the standard set forth in *Boeing*. On the record in this case, the defendants have not shown that the punitive damage award should be set aside by way of a judgment notwithstanding the verdict or an order for a new trial. *Boeing*, 411 F. 2d at 374-75.

III. COMPENSABLE INJURIES.

In *Jackson II*, this court, applying Mississippi law, determined that under Fed. R. Evid. 401, evidence concerning the likelihood of Jackson's developing cancer was relevant —and hence admissible—with respect to whether the defendants had a duty to warn. *Jackson II*, 750 F. 2d at 1320.

"In establishing the scope of a manufacturer's duty to warn, therefore, evidence of all known or foreseeable hazards posed by the product is relevant." *Id.* Jackson introduced so much cancer evidence, however, that we further indicated that the amount of evidence introduced could be justified only if Jackson had available to him, as a matter of Mississippi law, compensatory damages for (1) reasonable mental anguish resulting from his increased risk of cancer, or (2) the reasonable probability of his acquiring cancer. As we stated in *Jackson II,* "[w]e think that *either* ground would justify the inclusion of the evidence in this case, provided, of course, that the damages of which the cancer evidence would be probative were available to Jackson as a matter of law." *Id.* at 1321 (emphasis added).[19] Whether Jackson was entitled to these damages were issues we certified to the Mississippi Supreme Court. We continued: "If the Mississippi Supreme Court holds that Jackson has no right in the instant case to recover damages either for cancer as a probable future consequence or for mental anguish for the fear of contracting cancer, then the cancer evidence was wrongly admitted and a new trial will be in order. If, however, the Mississippi Supreme Court rules that either category of damages is recoverable, the cancer

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[19]The jury, of course, did not compartmentalize the award in this way; it simply returned a lump sum for compensatory damages and another for punitive damages. Ordinarily, "[o]ur proper review of such a verdict is not to parse the award into its various components, but to determine whether the award as a whole is within the universe of possible awards which are supported by the evidence." *Clark* v. *Taylor,* 710 F. 2d 4, 13 (1st Cir. 1983); *see also Narcisse* v. *Illinois Central Gulf R.R. Co.,* 620 F. 2d 544, 547 (5th Cir. 1980).

evidence was properly admitted."[20] *Id.* After carefully reviewing the Mississippi law, we are of the opinion that Jackson is entitled to recover upon both grounds.

A. *Recovery for Cancer.*

All parties concede that Jackson does not presently have cancer. The defendants argue that if Jackson does get cancer, he will be able to sue for compensatory damages associated with cancer at that time—that is, once the disease manifests itself. Jackson maintains that recovery is appropriate now since the potential development of cancer represents a future injury based on a presently existing cause of action. Relatedly, Jackson also argues that he *must* recover for cancer now or else the claim will be barred by the statute of limitations. Jackson's position is that

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[20]Footnote 12 to our opinion in *Jackson II* elaborated as to why in this case an affirmative answer to *either* question would justify the evidence.

> We recognize that, if the Mississippi Supreme Court rules that damages for mental anguish are recoverable in this context, but that damages for cancer as a probable future consequence are not, then it could be claimed that the type and quantity of cancer evidence in this case continues to pose too great a risk of unfair prejudice. This distinction between these grounds for admissibility of the cancer evidence would require a different balancing analysis under rule 403. Because the defendants took an all-or-nothing position at trial with respect to the cancer evidence and have maintained this position on appeal, we do not address this issue. Clearly, if the evidence was admissible as to one kind of damages, but not as to the other, a limiting instruction would have been in order upon request. No request for such an instruction was made in this case.

750 F. 2d at 1321 n. 12. We did not and do not decide the question whether, under circumstances different from those that obtain here, evidence on cancer in the quantity offered here would be admissible if directed only to recovery for mental anguish.

claim-splitting is disallowed in Mississippi and that the claim for cancer, insofar as it grows out of the same actionable tort which provides his recovery for asbestosis, must be raised now. Jackson reasons that, since the claim for cancer grows out of a single actionable tort, the statute of limitations with respect to cancer begins to run from the time the tort is actionable, that is, from the time asbestosis became manifest.

The defendants assert that claim-splitting is permitted in Mississippi when that would serve the ends of justice and fairness. In any case, the defendants insist Mississippi would adopt the discovery rule with respect to asbestosis-related injuries with the result that the statute of limitations for cancer would not begin to run until cancer actually appears. The development of cancer would be a separate tort from the development of asbestosis. As a result, defendants conclude, recovery for cancer is neither permitted nor required at this time.

The debate between the parties pivots on a single question, namely: What is the cause of action on which Jackson seeks recovery? The defendants contend that the existing cause of action is the existence of asbestosis. Jackson's position is that his cause of action is the inhalation of asbestos fibers "and the invasion of his body by those fibers, thus causing . . . physical damage." *Gideon* v. *Johns-Manville Sales Corp.*, 761 F. 2d 1129, 1137 (5th Cir. 1985). Although the statute of limitations question is concededly not dispositive of the issue of which injury provides the cause of action, the defendants' position is that if the statute of limitations would not begin to run until Jackson discovers cancer, then he should not be allowed to recover until that time: until cancer appears. Essentially, the defendants' position is that insofar as Jackson *may* bring suit for cancer at some later date, he should be required to wait until that date.

The defendants' argument must be rejected for two separate but related reasons. First, the truth of their crucial premise is not clear under Mississippi law. It is unclear whether Jackson *would* be permitted to sue to recover damages for cancer whenever cancer appears. Second, it is clear that under Mississippi tort law, plaintiffs may recover for probable future counsequences.

In *Dunaway* v. *W. H. Hopper & Associates, Inc.*, 422 So. 2d 749 (Miss. 1982), the Mississippi Supreme Court reiterated that when four conditions are met, the plaintiff will not later be permitted to litigate, "on the same cause of action . . . grounds for . . . recovery that were available" in the first action "regardless of whether they were asserted or determined in the prior proceeding." *Id.* at 751 (citing cases). The four identities which trigger the res judicata bar are: "(1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made." *Id.; see also Wright* v. *Mayor and Comm'rs of City of Jackson*, 421 So. 2d 1219 (Miss. 1982). The key issue, of course, involves the second identity: how to characterize the present cause of action. In *Estate of Kidd* v. *Kidd*, 435 So. 2d 632, 635 (Miss. 1983), the Mississippi Supreme Court explained that "[a] cause of action accrues . . . when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested." Even though events which develop subsequent to the accrual of the cause of action may affect the quantum of damages to which the plaintiff is entitled, such subsequent developments do not alter the fact that the cause of action accrued once the right to sue became vested. *See, e.g., Forman* v. *Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 346 (1943).

[10] We do suspect that under some circumstances Mississippi would adopt the discovery rule in the context of a latent disease case so as to protect a plaintiff who, through no fault of his own, discovers only belatedly that he is diseased. *See, e.g., Wilder* v. *St. Joseph Hospital*, 225 Miss. 42, 82 So. 2d 651, 653 (1955) (significant date is when plaintiff, "in the exercise of ordinary care, should have discovered" her injury). It would seem grossly unjust for the statute of limitations to begin to run before *any* disease is discovered. Similarly, the defendants may be correct that a plaintiff who later develops cancer may be able to recover at that time if an earlier jury, dealing with some other manifestation of asbestos exposure, concludes that the plaintiff does not presently have a reasonable probability of developing cancer. But these hypotheticals are not our case. Jackson established that he will probably get cancer. In addition, he has already discovered, and brought suit to recover for, his asbestosis.[21]

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[21]We note here something of a tension in the defendants' position. On one hand, they attempt to project an image of impending financial destruction; on the other, they ask us to refuse to permit Jackson to recover for the likelihood of developing cancer. Thus, if we were to believe the defendants' portent of doom, we should be loathe to tell Jackson that he cannot recover for cancer until later on—for if the defendants are correct, there may well be no money available later on.

We also note that arguably, the statute of limitations *does* begin to run for all injuries once some disease is manifest. *See, e.g., Martin* v. *Johns-Manville Corp.*, 322 Pa. Super. 348, 469 A. 2d 655 (1983) (where "present injury" was asbestosis, plaintiff was also *required* to recover for risk of cancer), *vacated on other grounds*, 494 A. 2d 1088 (Pa. 1985); *cf. Bendix Corp* v. *Stagg*, 486 A. 2d 1150, 1152-53 (Del. 1984). This is an issue which we need not decide, however. For present purposes, the fact that recovery for probable future injuries is *permissible* is sufficient to this award.

Under these circumstances, it is clear under Mississippi law Jackson may recover cancer damages. Further, having recovered cancer damages, he cannot later recover more if and when he develops cancer.

"The general rule is that where it is established that future consequences from an injury to a person will ensue, recovery therefor may be had, but such future consequences must be established in terms of reasonable probabilities." *Entex, Inc.* v. *Rasberry*, 355 So. 2d 1102, 1104 (Miss. 1978). Defendants respond that cancer does not develop *from* asbestosis, that it can never be a future consequence *of* asbestosis. Cancer is presumably a separate injury, and recovery must therefore await manifestation. This assertion is medically sound, but legally awry. In a sense, the injury in this case is the inhalation of asbestos fibers. It was not an *actionable* injury, however, meaning it was not legally cognizable, until at least one evil *effect* of the inhalation became manifest. There was no cause of action at all, in other words, until the asbestosis appeared. In this case, the effects of inhaling asbestos manifested themselves initially as asbestosis. In a different plaintiff, they may have manifested themselves as something as innocuous as asbestos callouses or as lethal as mesothelioma. But in any event, until the injury becomes actionable—once some effect appears—then the plaintiff is permitted to recover for all probable future manifestations as well.[22]

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[22]Defendants' reference to language in *Schweitzer* v. *Consolidated Rail Corp.*, (*Conrail*), 758 F. 2d 936 (3d Cir.), *cert. denied*, ___ U. S. ___, 106 S. Ct. 183, 88 L. Ed. 2d 152 (1985), is inapt. There, the Third Circuit explained that although "the possible existence of subclinical asbestos-related injury may be of interest to a histologist . . .[,] subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage . . . required to sustain a cause of action under generally appli-

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In *General Motors Acceptance Corp.* v. *Layton*, 353 So. 2d 749 (Miss. 1977), a plaintiff involved in an automobile accident sued to recover compensatory damages for injuries sustained in the collision. At the time of trial, the plaintiff was suffering only from a bruised knee. An expert witness testified tht persons with knee injuries, such as the plaintiff, " 'are more likely to develop arthritis in joints. . . .' " *Id.* at 743. The expert witness' testimony with respect to the increased likelihood of the plaintiff's developing arthritis in the bruised knee was sufficient to permit the plaintiff to recover for the reasonable probability of developing arthritis. It was not that the arthritis would develop *from* the bruise; is was rather that it would result from the injury which had manifested itself, at the time of trial, by a bruised knee. *Layton* is indistinguishable as a matter of tort law from this case. Jackson may recover for the medical probability of developing cancer.[23]

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cable principles of tort law." 758 F. 2d at 942. We tend to agree. Nevertheless, *Schweitzer* is obviously not this case. Here we have Jackson, whose injuries are far from being merely subclinical.

[23]Despite the clear applicability of *Layton*, the defendants have cited enough slightly off-point cases that we are compelled to say what this case is not. It is not an asbestos suit where a plaintiff with cancer who never sought to recover for asbestosis or any other asbestos-related injury but who did in fact *have* another asbestos-related injury comes before us seeking some recovery. The present case is therefore unlike those where a cancer victim who had not brought suit upon manifestation of another earlier-developing injury later attempts to get *something* once cancer appears. *See, e.g., Pierce* v. *Johns-Manville Sales Corp.*, 296 Md. 656, 464 A. 2d 1020 (1983); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d 111 (D.C. Cir. 1982). In *Wilson*, for example, the D.C. Circuit rejected JM's claim that "once some harm is apparent, a claim

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Of course, a plaintiff who sues with nothing more than hand callouses may have a significantly lower likelihood of developing cancer than does a plaintiff who exhibits asbestosis. That would be a question for the jury, to be decided by listening to and evaluating conflicting medical testimony. This plaintiff, however, has asbestosis; and evidence adduced at trial indicates that he has a greater than fifty percent chance of getting cancer.[24] Recovery for that possibility is permissible under Mississippi law.

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accrues not only for harm then manifest, but for all harm that may eventuate in the future as a result of the same conduct." 684 F. 2d at 117. In *Wilson*, the victim of asbestosis never brought suit; his widow did after the victim died of asbestos-related mesothelioma. The D.C. Circuit permitted the widow's suit but explicitly noted that "we need not and do not decide whether Johns-Manville's initial premise is correct, i.e., whether judgment on a claim for asbestosis . . . would have precluded a subsequent claim based on the . . . mesothelioma diagnosis. It suffices to point out that res judicata (claim preclusion) doctrine and policy would control the decision on that question." 684 F. 2d at 117.

Our case is different. Since Jackson has already sued to recover for asbestosis, it is enough for our purposes that Mississippi law clearly authorizes recovery for future injuries where such injuries are established in terms of reasonable probabilities.

To the extent that the defendants are arguing that we should disregard *Layton* and ignore the applicable Mississippi law because of the fact that this case ostensibly involves a mass tort, we note that the defendants' argument is unsupported by any Mississippi authority. We apply existing principles of Mississippi tort law, and *Layton* evinces one such principle unmistakably.

[24]There can be little doubt that the jury had ample evidence upon which it could have based its conclusion that Jackson will probably get cancer. According to Dr. James Merchant, "it's been shown conclusively that [asbestos] is a cause of cancer in human beings." 52 Record at 1362. Furthermore, according to

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B. Fear.

[11] Jackson also maintains that the cancer evidence introduced at trial was relevant insofar as it elucidates the basis of the mental distress he has suffered due to the knowledge that he will probably get cancer.[25] The defendants repeat their earlier argument: that "since there is no evidence that cancer 'develops from' asbestosis there can be no recovery for fear of an injury which has not occurred, and does not develop from' *any of Jackson's presently existing injuries.*" JM's brief at 25 (emphasis in original). But the crux of JM's argument, once again, is that these compensatory damages should not be awarded because so many people have been injured:

> The most compelling reason which supports rejection of claims for risk of future and separate diseases and fear of future and as yet undeveloped diseases, is that in the context of mass tort suits where latent diseases

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Dr. Merchant, "between 40 and 60 percent of those with asbestosis who have had previous heavy exposure die from bronchogenic carcinoma [lung cancer]." 52 Record at 1362. (According to Dr. Lewinsohn, the figure is 50 to 60 percent. *Id.*) Dr. Elliot McCaughey testified too that Jackson has a greater than 50 percent likelihood of developing an asbestos related cancer. 48 Record at 125. For more evidence in the record concerning the relationship between asbestos or asbestosis and cancer, *see, e.g.*, the testimony of Dr. Gerrit Schepers, 49 Record at 385-498, esp. 415-19 and 564-65; the testimony of Dr. David Ozonoff, 51 Record at 1084; and the testimony of Dr. Nicholas Demy, 51 Record at 1130-38, 1155.

[25]There was considerable testimony before the jury to the effect that Jackson will probably develop cancer; it is in that context that we discuss damages for mental anguish. We do not consider whether a plaintiff who cannot show that he will probably develop cancer may recover for mental distress.

> may develop from exposures which occurred ten, twenty or even forty years ago, the possible litigation is on a scale of such unprecedented magnitude that it is likely to exceed the resources not only for the defendants, but of the judicial system and society generally. *For this reason alone, recovery should be limited to present injuries.*

JM's brief at 27 (emphasis added).

It is thus quite clear that the defendants are asking this court to change the rules in Mississippi in the case of a mass tort. However, without repeating our earlier views concerning the defendants' argument that the magnitude of its wrong should circumscribe the damages awarded against it, we note simply that the defendants have pointed to no Mississippi authority which supports their radical proposal. Our role is to apply current Mississippi law, and under current law, Jackson's fear, which is a present injury, is comprehensible. *See e.g., Occhipinti* v. *Rheem Manufacturing Co.*, 252 Miss. 172, 172 So. 2d 186 (1965).

Jackson's fear is plainly a present injury. It is a fear which he experiences every day and every night. It is a fear which is exacerbated each time he learns that another victim of asbestosis has died of lung cancer.[26] It is a fear which, regardless of whether Jackson actually gets cancer, will haunt him for the rest of his life. Jackson's claim is not merely that he *might* get cancer, or that there is a remote possibility that he will. Jackson has established that there is a greater than fifty percent chance that he *will* get cancer. Who can gainsay that this knowledge causes him anguish, or that this anguish is reasonable? Certainly

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[26]For testimony concerning deaths due to asbestos exposure, see the testimony of Dr. Schepers, 49 Record at 415, 442, 449.

not this court and, in our view, not the Mississippi Supreme Court.[27]

Under Mississippi law, damage awards for mental distress may be rendered when either of two conditions is satisfied: when the plaintiff's mental suffering is accompanied by a physical injury, or when the plaintiff establishes the defendant's misconduct to have been wilful, gross, or wanton. In *Daniels* v. *Adkins Protective Service, Inc.*, 247 So. 2d 710, 711 (Miss. 1971), the Mississippi Supreme Court stated the general rule: "[T]here can be no recovery for mental pain and suffering from the mere negligent act of another unaccompanied by physical or bodily injury. However, damages are recoverable for mental pain and anguish by a wilful, wanton, malicious, or intentional wrong even though no bodily injury was sustained" (citing cases) (emphasis omitted). Summarizing Mississippi law, a federal district court explained that "[t]he Mississippi Supreme Court, on many occasions, has considered the award of damages for mental pain and suffering not accompanied by distinct physical injuries, and has adopted the rule that such are allowable when occasioned by a wilful wanton,

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[27]Defendants' make much of the fact that Jackson did not specifically state that he suffers mental distress. However, the jury could have concluded, after hearing the medical testimony, that the likelihood that Jackson will get cancer causes him anguish. In addition, the district court's charge clearly instructed the jury that in setting damages, the jurors should take into account (among other things) "[a]ll physical pain and mental anguish suffered by [Jackson] to date and such as he is reasonably certain to suffer in the future as a direct result of his complained of condition." 56 Record at 2444. Finally, counsel for JM acknowledged in his closing argument that Jackson testfied that "he is fearful of a cancerous condition at some time in the future." 55 Record at 2369.

intentional, or malicious wrong." *Johnson* v. *Ford Motor Co.*, 354 F. Supp. 645, 648 (N.D. Miss. 1973). *Accord, Sears, Roebuck & Co.* v. *Young*, 384 So. 2d 69, (Miss. 1980), *see also McCulloch* v. *Glasgow*, 620 F. 2d 47, 51 (5th Cir. 1980) (applying Mississippi law). We think it beyond cavil that in such a case as is before us, where the plaintiff manifests a present injury and has also succeeded in demonstrating gross misconduct, compensatory damages for mental distress are recoverable.

The record in this case supports either ground of recovery. In Part II, *supra*, we adverted to the jury's ostensible conclusion in awarding punitive damages that the defendants' conduct had been egregious. That same predicate justifies an award for injuries arising out of mental distress. In addition, Jackson's distress is accompanied by a present *physical* injury: He has asbestosis.

For us to rule that this case should be an exception to what is clearly the law of Mississippi would be to intrude upon the prerogative of the Mississippi courts, and it would be to do so without any indication whatsoever from the Mississippi courts that such an intrusion is welcome or that such an outcome is desired. Furthermore, we are aware that other jurisdictions have addressed this issue, and as recent commentators have noted, "[c]ourts having considered cancerphobia ["the present anxiety over developing cancer in the future"] almost uniformly have allowed it. The few courts not allowing recovery have done so on the basis of a lack of physical injury, the unreasonableness of the fear under specific facts, or because the fear was claimed by a wife due to the observation of the injuries to her husband. Notably, this minority has not based its decision on the noncompensability of cancerphobia." Gale & Goyer, *Recovery from Cancerphobia and Increased Risk*

of Cancer, 15 Cumberland L. Rev. 723, 730-31 (1985).[28] Current Mississippi tort law permits recovery for the injury of mental distress, and we have no reason to believe that the rule would be altered in this case.

IV. CONCLUSION

In brief response to the dissent, we reaffirm the position taken in *Jackson II* that Congress' silence in the face of a desperate need for federal legislation in the field of asbestos litigation does not authorize the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions. Displacement of state law is primarily a decision for Congress, and Congress has yet to act.

Following the Mississippi Supreme Court's decision to decline certification of the issues presented on this appeal, our procedure has been to apply existing Mississippi tort law to the facts of this case. Having studied Mississippi tort law, as well as decisions of other jurisdictions in cases such as this one, we conclude that the fact that this case involves a claim of strict liability and that it grows out of a mass tort would not incline the Mississippi Supreme Court to treat it differently from other torts, especially those where the jury has found that the defendants' conduct was wanton, reckless, or grossly indifferent to the rights of others. We therefore conclude that under Mississippi law, Jackson is entitled to punitive damages, and

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[28]Significantly, virtually every case cited by the defendants for the proposition that damages for mental distress would not be recoverable fall into the third category of exceptions noted by Gale & Goyer; that is, virtually all involved attempts by the spouse to recover compensation for mental distress where the physical injury was suffered by the other spouse. *See, e.g.,* JM's brief at 12.

to compensatory damages for the reasonable probability of getting cancer and for the present fear that he will get cancer in the future. Accordingly, the judgment of the district court is AFFIRMED.

CLARK, Chief Judge, with whom GEE, GARZA, POLITZ, and JOLLY, Circuit Judges, join, dissenting:

The learned, lengthy opinion of the majority is the wrong response by the wrong court.

The *wrong response* sprang from several sources. First, looking backward to the signposts of *stare decisis* has turned the court away from the road to justice because this case exceeds the limits of ordinary case and controversy litigation in our complex, interrelated society. Second, the court responds to innovative lawyers pressing for immediate financial recovery for individual clients (and themselves). We do not fault the lawyers. That counsel wish to continue the present mode of case-by-case adjudication is all too understandable. The nature of their professional concern must, under the canons of ethics, run only to their present clients. They are not required to anticipate the impact of today's judgment on the host of tomorrow's claimants they do not represent but who deserve to share in the finite proceeds which a limited group of defendants can provide to compensate mass tort victims.

Third, the court is frustrated by lack of congressional action. A number of legislative solutions has been proposed for the problems we must confront today and tomorrow throughout America because of yesterday's production and use of asbestos. None has been enacted. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the great-

est good for society.[1] Yet, Congress can refuse to act while the court cannot abstain from resolving a case presented.

Fourth, the majority's response is directly affected by the question perceived. This seminal case concerns much more than James Leroy Jackson's individual claim against some companies that may have furnished an unsafe product to a shipyard in which he worked. We know better.

Our dockets tell us so—dockets in the Southern District of Mississippi, dockets in the Eastern District of Texas, dockets in the Eastern District of Louisiana, dockets in the Southern District of Texas, dockets throughout the state and federal courts across this nation. Tens of thousands of similarly situated claimants are already seeking relief against the same defandants, and a legion of other potential plaintiffs stand in the wings, awaiting the predictable manifestations of their identical exposure. Other public and private plaintiffs seek recovery from the same defendants for costs incurred in removing asbestos materials from structures in every area of the country.[2]

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[1]Pneumoconiosis, black lung disease, in coal mines cried out for a national legislative response; it received one. 30 U.S.C. § 901 *et seq.* Asbestos disease speaks with a louder voice.

[2]Numerous texts and articles define the dimensions of asbestos litigation, litigation costs, and the resulting fiscal problems created for plaintiffs and defendants. *See, e.g.*, Hensler, Felstiner, Selvin, Ebener, *Asbestos in the Courts: The Challenge of Mass Toxic Torts* (The Institute for Civil Justice, Rand Corp. 1985); The Institute for Civil Justice, *An Overview of the First Five Program Years* (1985); Kakalik, Ebener, Felstiner, Haggstrom & Shanley, *Costs of Asbestos Litigation* (The Institute for Civil Justice, Rand Corp. 1984); Kakalik, Ebener, Felstiner, Haggstrom & Shanley, *Variation in Asbestos Litigation, Compensation and Expenses* (The Institute for Civil Justice, Rand Corp. 1984); T. Willging, *Asbestos Case Management: Pretrial and Trial Procedures* (Federal Judicial

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The United States as amicus curiae tells us so—by the very act of filing a brief in this "private" action as well as by the facts they furnish on present claimants, past expenditures and predicted future deaths and injuries related to asbestos exposure.

Finally, the court fails to take into account that what we say here creates new precedent. We are not passing a milepost along a known path leading to a chosen goal. Instead, the court, without a goal, chooses a new path which will compel the way of all litigants who come later. Given this situation, the proper judicial response should be one based on a broad view of the whole question.

The *wrong court* gives this wrong response. We do not say this because the majority is instructed as a prediction of what the Mississippi Supreme Court would decide about the novel issues fixed in our jurisprudence by today's de-

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Center 1985); Harris, *Asbestos Chapter 11 "Solution" to the Tort Litigation System in Recent Developments in Tort Law Reform, 39 The Business Lawyer* 209 (Johnson ed. Nov. 1983); Locks, *Asbestos-Related Disease Litigation: Can the Beast Be Tamed?* 28 Vill. L. Rev. 1184 (1983); Markaron, *The Inapplicability or Reduction of Punitive Damages in Asbestos Litigation,* Industrywide Litigation, Defense of Asbestos Lawsuits, DRI 81-1; Phillips, *Asbestos Litigation: the Test of the Tort System* 36 Ark. L. Rev. 343 (1983); Special Project, *An Analysis of the Legal, Social and Political Issues Raised by the Asbestos Litigation,* 36 Vand. L. Rev. 573 (1983); Comment, *An Examination of Recurring Issues in Asbestos Litigation* 46 Alb. L. Rev. 1307 (1982); Comment, *Asbestos Litigation: The Dust Has Yet to Settle,* 7 Fordham Urb. L. J. 55 (1978); Note, *Mass Liability and Punitive Damages Overkill,* 30 Hastings L. J. 1797 (1979); Comment, *The Asbestos Tragedy: Legal Issues and the Need for Reform,* 8 U. Dayton L. Rev. 353 (1983); Olick, *Chapter 11—A Dubious Solution to Massive Toxic Tort Liability,* 18 *Forum* 361 (1983); Brodeur, "Annuals of Law" (Asbestos—Parts I-IV), *The New Yorker,* (June 10, 1985-July 1, 1985).

cision. We say so because a national problem has been adjudicated as though it were a state problem after the concerned state court wisely refused to accept our certification of the issues to it.

Sadly the majority chose to certify these issues to that court rather than to the Supreme Court of the United States. The United States Supreme Court could have given us proper responses. More's the pity that the majority reads nothing into the Mississippi Supreme Court's refusal. We who dissent do not believe that the Mississippi Supreme Court simply arbitrarily declined to answer the questions posed. Such a belief would attribute to them a failure to perform an important judicial function. The more plausible reasons are that the views of the only two Mississippi judges of our court were considered correct or that the issues certified were not perceived to be proper, controlling issues that court could settle, or both.

We believe that the Mississippi Supreme Court thought, as we do, that if some judicial forum must respond to Jackson's plea, there is only one right court to do so—the Supreme Court of the United States. The problems we face in this litigation are ones of national public policy. To respond to such policy is beyond the ability of this diversity-based court. Such policy cannot be subject to the whims of individual states because matters of national public policy have nationwide application. Since Congress has not provided a solution, the Supreme Court of the United States should have been asked to provide one. Had the Court answered the questions previously suggested (750 F. 2d at 1335), it would have afforded the only justice a judicial forum is capable of providing for this case.

Because the majority's wrong response comes from the wrong court, we respectfully dissent.

SUPREME COURT OF MISSISSIPPI

No. 56351

JAMES LEROY JACKSON, - - - *Plaintiff-Appellee,*

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL., - - - - - - *Defendants-Appellants.*

May 22, 1985.

Certifying questions from United States Court of Appeals, Fifth Circuit.

Danny E. Cupit, Cupit & Maxey, Jackson, Ronald L. Motley, Brinson Williams, Barnwell, S.C., Richard F. Pate, Mobile, Ala., for Jackson.

William N. Reed, John Holloman, III, Watkins, Ludlam & Stennis, Jackson, Lively M. Wilson, Dorothy J. Chambers, Louisville, Ky., Roy C. Williams, Megehee, Brown, Williams & Mestayer, Pascagoula, for Johns-Manville, et al.

EN BANC.

The United States Court of Appeals for the Firth Circuit has certified this cause to this Court, asking that we decide the following questions of law:

Whether (1) mental anguish damages; (2) damages for cancer as a probable future consequence, and (3) punitive damages are available in asbestos products liability actions. 757 F. 2d 614.

A majority of this Court after considering these issues will decline certification.

Therefore, we respectfully decline to rule upon the questions presented.

PATTERSON, C. J., WALKER, and ROY NOBLE LEE, P.JJ., and HAWKINS and DAN M. LEE, JJ., concur.

PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., dissent.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 82-4288

JAMES LEROY JACKSON, - - - *Plaintiff-Appellee,*

v.

JOHNS-MANVILLE SALES CORPORATION and
RAYBESTOS-MANHATTAN, INC., - *Defendants-Appellants.*

April 4, 1985.

Roy C. Williams, Pascagoula, Miss., Lively M. Wilson, Dorothy J. Chambers, Louisville, Ky., John H. Holloman, III, William N. Reed, Jackson, Miss., for defendants-appellants.

Richard F. Pate, Mobile, Ala., Danny E. Cupit, Jackson, Miss., Ronald L. Motley, Barnwell, S.C., Arthur R. Miller, Cambridge, Mass., for plaintiff-appellee.

Joseph R. Steele, Port Arthur, Tex., amicus curiae—Asbestos Claimants in the State of Tex.

Adolph J. Levy, New Orleans, La., amicus curiae—The Ass'n of Trial Lawyers of America.

Broadus A. Spivey, Austin, Tex., amicus curiae — Broadus A. Spivey.

Appeals from the United States District Court for the Southern District of Mississippi; Walter L. Nixon, Jr., Judge.

Certification declined May 22, 1985, 469 So. 2d 99.

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.*

PER CURIAM:

This court acting en banc in *Jackson* v. *Johns-Manville Sales Corp.*, 750 F. 2d 1314 (5th Cir. 1985), determined to certify three questions of Mississippi law to the Supreme Court of Mississippi and requested the parties to submit a joint statement of facts and certificate of questions. The parties, in response, have agreed on the statement and certificate. Accordingly, we now certify the questions to the Supreme Court of Mississippi pursuant to its Rule 46.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF MISSISSIPPI, PURSUANT TO RULE 46, MISSISSIPPI SUPREME COURT RULES

TO THE SUPREME COURT OF MISSISSIPPI AND THE HONORABLE JUDGES THEREOF:

It appears to the United States Court of Appeals for the Fifth Circuit that this case involves questions of Mississippi law that are determinative of the cause and for which we find neither dispositive statutory provision nor controlling precedents in the decisions of the Supreme Court of Mississippi. As we stated in *Jackson* v. *Johns-Manville Sales Corp.*, 750 F. 2d 1314 (5th Cir. 1985), the resolution of these questions requires a careful weighing of competing state policies and potentially could affect a large number of people as well as have an enormous economic impact. We hereby certify the following questions of law to the Supreme Court of Mississippi for instructions.

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*Judge Jerre S. Williams did not participate in the decision of this case.

1. *Style of the Case*

The certified case is James Leroy Jackson, Plaintiff-Appellee, v. Johns-Manville Sales Corporation and Raybestos-Manhattan, Inc., Defendants-Appellants, number 82-4288, on the docket of the United States Court of Appeals for the Fifth Circuit, and is on appeal from the United States District Court for the Southern District of Mississippi.

2. *Stipulated Statement of Facts*

This civil action was commenced by James L. Jackson ("Jackson") on December 15, 1978, against several manufacturers and distributors of asbestos-containing products for damages arising out of Jackson's exposure to asbestos. Jackson's sole legal theory of liability was based upon a failure to warn under strict liability in tort. Additionally, Jackson sought punitive damages on grounds that the Defendants were aware of the dangers of asbestos exposure for decades but willfully and intentionally suppressed information concerning the association between asbestos and disease. The case was tried before a jury in May and June 1982. An amended final judgment entered on June 11, 1982, awarded Jackson actual damages of $345,750, punitive damages against Johns-Manville Sales Corporation in the amount of $500,000, and punitive damages against Raybestos-Manhattan, Inc., in the amount of $125,000.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit reversed in part and remanded the case for a new trial. *Jackson* v. *Johns-Manville Sales Corp.*, 727 F. 2d 506 (5th Cir. 1984). Thereafter, the Fifth Circuit *en banc* vacated portions of the panel decision and ordered that certain questions be certified to the Mississippi Supreme Court in accordance with Mississippi Supreme Court Rule 46. *Jackson* v. *Johns-Manville Sales Corp.*, 750 F. 2d 1314 (5th Cir. 1985) (en banc).

Jackson was employed as a sheet metal worker at the Ingalls Shipyard in Pascagoula, Mississippi, from 1953 until 1971. During that time he participated in the repair, construction or overhaul of approximately 69 U. S. Navy and commercial vessels. During the course of his employment at Ingalls, Jackson did not personally handle asbestos-containing products on a daily basis, but breathed significant quantities of dust containing asbestos fibers. Jackson voluntarily left the shipyard in 1971 and was not exposed to asbestos after that date.

In November 1978, Jackson was diagnosed as having asbestosis, a fibrotic scarring condition of the lungs caused by breathing substantial quantities of asbestos fibers over an extended period of time. The disease is incurabe and progressive in nature. Jackson's physicians testified at trial that Jackson had a pulmonary disability, that his life expectancy probably had been shortened, that he faced an increased susceptability to colds, flu and other pulmonary infections, and that his lung performance and capacity were impaired and expected to get worse. Jackson's wife testifiled that Jackson was increasingly upset at his declining ability to work at home.

Asbestos is a carcinogen, but does not inevitably cause cancer in all people. There was no evidence at trial that Jackson had ever been diagnosed as having cancer. Jackson's experts testified that Jackson's exposure to asbestos increased his risk of contracting cancer in the future. There also was opinion testimony based upon a reasonable degree of medical certainty that, because of his medical condition and history of asbestos exposure, Jackson had a greater than 50% risk of contracting cancer in the future. However, Jackson's local physician testified that Jackson probably would not contract cancer in the future.

This is an appeal of the first "asbestos case" tried in Mississippi. There are approximately 1700 other "asbestos

cases" pending in Mississippi's state and federal courts. Regarding the scope and financial impact of the asbestos litigation in Mississippi and the United States, the Defendants direct the Court's attention to the statistical data compiled in the "Appendix" to the dissenting opinion in this case, *Jackson* v. *Johns-Manville Sales Corp.*, 750 F. 2d at 1335-41. With certain minor exceptions, this statistical data was not introduced during the trial of this case.

3. *Questions Certified*

1. Whether a Plaintiff whose cause of action is based upon strict liability in tort can recover punitive damages against Defendants who have been or may be subjected to multiple awards of compensatory and punitive damages for the same wrongful conduct.

2. Whether a Plaintiff who does not presently have cancer can state a claim or recover damages in an action based upon strict liability in tort for mental distress resulting from his knowledge that he has an increased risk of contracting cancer in the future.

3. Whether a Plaintiff who does not presently have cancer can state a claim or recover damages in an action based upon strict liability in tort for the reasonable medical probability that he has a greater than 50% risk of contracting cancer in the future.

The Supreme Court of Mississippi, of course, will not be bound in any way by this articulation of the questions in its consideration of the issues involved. *Martinez* v. *Rodriguez*, 394 F. 2d 156, 159 n. 6 (5th Cir. 1968). The entire record in this case, together with copies of the briefs of the parties, are transmitted herewith.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 82-4288

JAMES LEROY JACKSON, - - - *Plaintiff-Appellee,*

v.

JOHNS-MANVILLE SALES CORPORATION and
RAYBESTOS-MANHATTAN, INC., - *Defendants-Appellants.*

Jan. 21, 1985.

Former shipyard worker brought strict liability action against manufacturers of asbestos allegedly used in shipyard in which he worked, seeking recovery for injuries allegedly caused by manufacturers' failure to warn of danger associated with exposure to their asbestos products. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., Chief Judge, entered judgment in favor of worker, and appeals were taken. The Court of Appeals, 727 F. 2d 506, affirmed in part, reversed in part, and remanded for a new trial. On en banc rehearing, the Court of Appeals, Randall, Circuit Judge, held that: (1) asbestos litigation, with attendant problems of proper distribution of resources of asbestos industry, was not a proper area for creation of a federal common law, and (2) questions as to availability of mental anguish damages, damages for cancer as a probable future consequence, and punitive damages were certified to the Mississippi Supreme Court.

Parts II, V, and VIII of panel opinion, 727 F. 2d 506, reinstated, with remainder of panel opinion superseded; questions certified to Mississippi Supreme Court.

Alvin B. Rubin, Circuit Judge, filed concurring opinion.

Clark, Chief Judge, dissented and filed an opinion in which Gee, Garza, Politz and E. Grady Jolly, Circuit Judges, joined.

1. Evidence Key 99

Evidence meets threshold test of relevancy if evidence tends to make existence of any fact that is of consequence to determination of action more probable or less probable than it would be without evidence. Fed. Rules Evid. Rule 401, 28 U.S.C.A.

2. Federal Courts Key 823

A trial court's determination as to whether probative value of evidence is substantially outweighed by danger of unfair prejudice will not be reversed absent a finding of an abuse of discretion. Fed. Rules Evid. Rule 403, 28 U.S.C.A.

3. Evidence Key 146
Products Liability Key 81

In asbestos products liability action, evidence consisting of letters written in 1935 by a representative of asbestos manufacturer who occupied a dominant position with manufacturer at time letters were written was relevant, of probative value, and not unfairly prejudicial, and thus admissible. Fed. Rules Evid. Rules 401, 403, 28 U.S.C.A.

4. Products Liabiilty Key 14

A manufacturer fulfills its duty to warn of hazards of an inherently unsafe product only if it warns of all dangers associated with product of which it has actual or constructive knowledge.

5. Federal Courts Key 374

To be "uniquely federal" and thus a sufficient predicate for imposition of a federal substantive rule, an interest must relate to an articulated congressional policy or directly implicate authority and duties of the United States as sovereign.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Courts Key 374

In view of absence of a uniquely federal interest in area of asbestos litigation with respect to question of appropriateness of punitive damages assessments, and of practical problems that would attend displacement of state law in this area, asbestos litigation, with attendant problems of proper distribution of resources of asbestos industry, was not a proper area for creation of a federal common law.

7. Damages Key 91(1)

Punitive damages are generally available under Mississippi law if defendants have engaged in wanton, gross or intentional conduct in nature of an independent tort.

Roy C. Williams, Pascagoula, Miss., Lively M. Wilson, Dorothy J. Chambers, Louisville, Ky., John H. Holloman, III, William N. Reed, Jackson, Miss., for defendants-appellants.

Richard F. Pate, Mobile, Ala., Danny E. Cupit, Jackson, Miss., Ronald L. Motley, Barnwell, S.C., Arthur R. Miller, Harvard Law School, Cambridge, Mass., for plaintiff-appellee.

Joseph R. Steele, Port Arthur, Tex., for amicus curiae-Asbestos Claimants in the State of Tex.

Adolph J. Levy, New Orleans, La., for amicus curiae-The Ass'n of Trial Lawyers of America.

Broadus A. Spivey, Austin, Tex., for amicus curiae-Broadus A. Spivey.

Appeals from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.

RANDALL, Circuit Judges.*

In this Mississippi diversity case, plaintiff James L. Jackson, a former shipyard worker, seeks recovery of actual and punitive damages against defendants Johns-Manville Sales Corporation, Raybestos-Manhattan, Inc., and H.K. Porter Company, manufacturers of asbestos products, for injuries allegedly caused by the defendants' failure to warn of the dangers associated with exposure to their asbestos products. Following extensive discovery and a lengthy jury trial, the district court entered judgment in favor of Jackson and against all defendants except H.K. Porter Company for $391,500 in compensatory damages and $625,000 in combined punitive damages. On appeal, a panel of this court affirmed in part, reversed in part, and remanded the case for a new trial. *Jackson* v. *Johns-Manville Sales Corp.*, 727 F. 2d 506 (5th Cir. 1984). We granted en banc rehearing, 727 F. 2d at 533, and now decide to certify to the Mississippi Supreme Court three significant questions of Mississippi law.

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*Judge Jerre S. Williams did not participate in the decision of this case.

I. FACTUAL AND PROCEDURAL HISTORY.

The panel opinion fully sets forth the facts of this case, 727 F. 2d at 509-11, and so we repeat them here only in summary fashion.

James L. Jackson worked for Ingalls Shipbuilding Corporation (Ingalls) at its yard in Pascagoula, Mississippi, from 1953 until 1971. During his tenure at Ingalls, Jackson worked first as a sheet-metal mechanic and then as a work leaderman or supervisor. As a sheet-metal mechanic, Jackson drilled holes in asbestos-containing materials and cut gaskets from asbestos cloth. While working as a work leaderman, Jackson was required to move around naval ships amidst craftsmen making extensive use of asbestos products. There is no question that Jackson in both capacities was exposd to significant quantities of asbestos dust.

Approximately seven years after leaving Ingalls, Jackson was diagnosed as having asbestosis, a progressive and incurable pulmonary disease caused by exposure to asbestos. As a result of the asbestosis, Jackson's life expectancy was reduced and his lung capacity significantly impaired. Moreover, Jackson alleges that his exposure to the asbestos markedly increased his risk of contracting lung cancer and other malignancies. On November 21, 1978, Jackson joined with several other parties in filing a class action in federal district court against a number of manufacturers and sellers of asbestos materials that were allegedly used at Ingalls. Following the district court's denial of class certification, Jackson filed an amended complaint against twelve defendants, eight of whom settled and one of whom was granted summary judgment. By the time of trial, the remaining defendants were Johns-Manville Sales Corporation (Johns-Manville); H.K. Porter Company, Inc. (H.K.

Porter); and Raybestos-Manhattan, Inc. (Raybestos-Manhattan).[1]

Jackson argued at trial that the three defendants were liable under the Mississippi law of strict liability for manufacturing and selling asbestos products made unreasonably dangerous by the defendants' failure to warn of the products' inherent hazards. In addition, Jackson sought to recover punitive damages on the ground that the defendants had conspired to suppress information concerning the dangers of asbestos exposure and the disease of asbestosis for more than three decades. In response, the defendants contended principally that, because they neither knew nor had reasonable grounds to believe that their asbestos products posed any significant danger to shipyard workers, they could not be held responsible for Jackson's injuries. The jury found that Johns-Manville and Raybestos-Manhattan were strictly liable to Jackson for $391,500 in compensatory damages. The jury also imposed punitive damages of $500,000 against Johns-Manville and $125,000 against Raybestos-Manhattan. Finally, H.K. Porter was found to be not liable to Jackson. The district court entered judgment accordingly.

On appeal, a panel of this court affirmed in part, reversed in part, and remanded. 727 F. 2d 506. Following an extensive review of both Mississippi caselaw and the instant record, the panel found that the district court had accurately applied the Mississippi law of strict liability and that sufficient evidence was adduced at trial to support the necessary finding of proximate cause. The panel moreover affirmed the trial court's refusal to disclose to the jury the amounts for which Jackson had previously settled with eight of the initial defendants. The panel, none-

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[1]In Part II of this opinion, only Johns-Manville and Raybestos-Manhattan will be referred to as "defendants."

theless, ordered a new trial on the ground that the district court had committed reversible error in admitting two items of evidence that posed a substantial danger of unfair prejudice. First, the panel found that, because (1) Jackson did not allege that he suffered from cancer and (2) it was clearly established at trial that asbestosis itself does not cause or lead to cancer, the evidence of Jackson's increased risk of contracting cancer introduced at trial was irrelevant or at least should have been excluded under Federal Rule of Evidence 403. The panel left to the district court's initial discretion on retrial whether evidence of Jackson's fear of cancer should be admitted and whether such a claim was even permitted by the pleadings. Second, the panel held that the "Sumner Simpson papers" were too remote in time and too attenuated in subject matter to be probative of any material fact and thus also should have been excluded under rule 402 for irrelevancy or at least under rule 403 for being unduly prejudicial. Finally, the panel held that the district court also erred in allowing the recovery of punitive damages. According to the panel, punitive damages are inappropriate "where the allowance of punitive damages carries the manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of punitive damages are otherwise served." 727 F. 2d at 529. This court voted to rehear the case en banc, 727 F. 2d at 533, thereby vacating the panel opinion. *See* Fifth Circuit Local Rule 41.3.

II. DISCUSSION

At the outset, we reinstate Parts II, V, and VIII of the panel opinion, denominated "Strict Liability in Tort," "Proximate Causation," and "Disclosure to Jury of Settlement Amounts," respectively. The remainder of the

panel opinion is superseded in its entirety by this opinion. Because the defendants, in their briefs before the panel, attacked the portion of the judgment awarding compensatory damages primarily by means of challenges to the admissibility of certain evidence, rather than challenges to the substantive law applied, we address first their evidentiary challenges and then turn to their substantive law challenges.

A. *Evidentiary Issues.*

1. The Sumner Simpson Papers.

Johns-Manville and Raybestos-Manhattan contend that the district court committed reversible error by admitting three of the so-called "Sumner Simpson papers."[2] These papers consist of, among other things, correspondence to and from Sumner Simpson, who occupied a dominant position in Raybestos-Manhattan from 1929 until his death in 1953. The first letter, dated September 25, 1935, was written by A.F. Rossiter of *Asbestos* magazine to Simpson. In this letter, *Rossiter* refers to previous requests made by Simpson that nothing be published in that magazine concerning the hazards posed by asbestos dust. In the second letter, dated October 1, 1935, Simpson states to Vandiver Brown, Johns-Manville's attorney, that "the less said about asbestos, the better off we are." Simpson in the same letter also refers to English articles on asbestos dust control and comments that *Asbestos* has "been very decent about not re-printing the English articles." Finally, in the third letter, dated two days later, Brown replies: "I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity." He also suggests that, if they should decide eventually not to

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[2]These letters are set out in full in the appendix to the panel opinion. *See* 727 F. 2d at 532-33.

object to the publication of such an article, American instead of English data should be used on the theory that the asbestos dust was "considerably milder" in North America.

[1] Under Federal Rule of Evidence 401, evidence meets the threshold test of relevancy[3] if the evidence tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also Carter* v. *Massey-Ferguson, Inc.*, 716 F. 2d 344, 347 (5th Cir. 1983). Jackson introduced the Sumner Simpson letters into evidence to show, *inter alia*, that Johns-Manville and Raybestos-Manhattan knew or should have known of the dangers asbestos products posed to shipyard workers during the years Jackson worked in that capacity at Ingalls. Under Restatement (Second) of Torts § 402A comment j,[4] a manufacturer is only required

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[3]Federal Rule of Evidence 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 402.

[4]Restatement (Second) of Torts § 402A comment j reads in pertinent part:

> *j. Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the in-

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to warn of dangers of which he knew or should have known "by the application of reasonable, developed human skill and foresight." *See also Borel* v. *Fibreboard Paper Products Corp.*, 493 F. 2d 1076, 1089 (5th Cir. 1973) (manufacturer is held to knowledge and skill of an expert), *cert. denied*, 419 U. S. 869, 95 S. Ct. 127, 42 L. Ed. 2d 107 (1974).

The defendants argue that the letters are of no probative value as to foreseeability because they refer only to the danger faced by miners and plant workers in being exposed to raw asbestos, and it was clearly established at trial that Jackson worked solely with finished asbestos products. We note as an initial matter that the texts of the letters themselves do not limit their discussion to miners or plant workers. Rather, on their face, the letters appear to pertain to the problems of asbestos dust control in general. Nevertheless, even assuming that the defendants are correct in their contention that the letters refer only to certain groups of workers, we think that such a distinction plainly goes more to the weight than to the admissibility of the evidence. A study indicating that ex-

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gredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

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Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

posure to asbestos fibers is likely to cause harm to one group of workers is at least suggestive of the fact that other groups of workers who are also exposed to asbestos fibers face similar dangers. The letters were not so remote in subject matter as to be devoid of probative value.

Nor do we believe that the letters are irrelevant because they were written twenty years before Jackson began to work at Ingalls. Jackson alleged at trial that the defendants knew of the dangers posed by asbestos at least between 1953 and 1971, the time during which he handled the asbestos products. Evidence that the defendans had such knowledge in 1935 clearly makes Jackson's allegation that the dangers of the asbestos products were foreseeable in 1953 more probable than it would have been without such evidence. It remains for the jury to determine whether after-acquired knowledge was sufficient to absolve the defendants of a duty to warn.[5]

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[5]The panel opinion relies on the famous Fleischer-Drinker Report of 1946, Fleischer, Viler, Gade & Drinker, *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, 28 J. Indus. Hygiene & Toxicology 9 (1946), as an example of the research developments that occurred between 1935 and 1953. Other evidence presented at trial, however, supports Jackson's claim that his injuries remained foreseeable in the 1940's and 1950's. *See, e.g.*, Testimony of Dr. Gerrit Schepers, Record, Vol. 49, at 437-76. *See generally* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 596-605 (1983) (evidence available to prove foreseeability against asbestos manufacturers). We are unable to say that as a matter of law the knowledge acquired after 1935 excused the defendants from performing any duty they might have had to place warnings on their asbestos products. *See Moran* v. *Johns-Manville Sales Corp.*, 691 F. 2d 811, 814-15 (6th Cir. 1982) (evidence introduced at trial of known or knowable risks to insulation workers was ample).

[2, 3] Although relevant, evidence can be excluded under Federal Rule of Evidence 403[6] if its probative value is substantially outweighed by the danger of unfair prejudice. A trial court's determination under rule 403, however, will not be reversed absent a finding of an abuse of discretion. *Ballou* v. *Henri Studios, Inc.*, 656 F. 2d 1147, 1153 (5th Cir. 1981); *King* v. *Ford Motor Co.*, 597 F. 2d 436, 445 (5th Cir. 1979). We find no abuse of discretion on the part of the district court. Nothing in the letters is of such an inherent nature as to inflame the passions of the jury or invoke its sympathies. Moreover, counsel for Johns-Manville and Raybestos-Manhattan had ample opportunity, of which they took full advantage, to ensure that the jury fully appreciated the remotenes of the letters both in time and subject matter. The slight danger that the admission of such evidence would have caused sufficient unfair prejudice to warrant exclusion was properly ignored.[7] *See Gross* v. *Black & Decker (U.S.), Inc.*, 695 F. 2d

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[6]Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

[7]We reject out of hand defendants' contention that the fact that H. K. Porter was found not to be liable proves "beyond rational debate" the undue prejudicial nature of the Sumner Simpson papers. As the panel noted, " '[w]hether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty . . . is immaterial. Juries may indulge in precisely such motives or vagaries.' " 727 F. 2d at 524 (quoting *Borel, supra*, at 1094; original from *United States* v. *Dotterweich*, 320 U. S. 277, 279, 64 S. Ct. 134, 88 L. Ed. 48 (1943)).

858, 863 (5th Cir. 1983); *United States* v. *Hearod*, 499 F. 2d 1003, 1005 (5th Cir. 1974).[8]

2. Admission of Cancer Evidence.

At trial, a number of expert witnesses testified that Jackson's exposure to asbestos significantly increased his risk of contracting cancer. Three of these expert witnesses testified both that exposure to asbestos generally results in some increased risk of cancer and that, based upon Jackson's medical records and history of asbestos exposure, it could be estimated that Jackson specifically had a greater than fifty percent chance of contracting asbestos-related cancer in the future. On appeal, Johns-Manville and Raybestos-Manhattan assert that admission of this evidence was prejudicial error because the relationship between asbestos and cancer was not relevant to an issue in the case. In addition, they argue that, even if such evidence was relevant, its emotional impact substantially outweighed its probative value. In response, Jackson alleges that the evidence was in fact relevant to and quite probative of the defendants' liability, his mental anguish resulting from his increased risk of cancer, and the availability of prospective damages associated with cancer.

[4] Turning first to the admissibility of cancer evidence to show liability, we find that under rule 401 cancer evidence was relevant with respect to whether the defendants had a duty to warn. In *State Stove Manufacturing Co.* v. *Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*,

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[8]Johns-Manville also alleges that the district court committed reversible error by admitting numerous other pieces of evidence that were of such a nature as to create a substantial danger of unfair prejudice. These items all were introduced to show that Johns-Manville had knowledge of asbestos' dangers decades before Jackson began working for Ingalls. For essentially the same reasons as those stated above, we find no abuse of discretion.

386 U. S. 912, 87 S. Ct. 860, 17 L. Ed. 2d 784 (1967), the Mississippi Supreme Court adopted Restatement (Second) of Torts, § 402A,[9] at least insofar as it subjects manufacturers to strict liability for injuries caused by their products sold in an unreasonably dangerous condition. Comment k to § 402[10] provides that some products inher-

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[9]Restatement (Second) of Torts § 402A provides:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[10]Restatement (Second) of Torts § 402A comment k provides in part:

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper

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ently unsafe can be prevented from being unreasonably dangerous by furnishing the user with an adequate warning of the hazards of the product. *See Borel* v. *Fibreboard Paper Products Corp., supra,* at 1089-90; *Alman Bros. Farms & Feed Mill, Inc.,* v. *Diamond Laboratories, Inc.,* 437 F. 2d 1295, 1302-03 (5th Cir. 1971); *Pridgett* v. *Jackson Iron & Metal Co.,* 253 So. 2d 837, 843-44 (Miss. 1971). Because one of the purposes of the warning is to allow the user to make his own decision whether to expose himself to the risks of harm, *Borel, supra,* at 1089, a manufacturer fulfills its duty to warn in this context only if it warns of all dangers associated with its products of which it has actual or constructive knowledge. *See Pavlides* v. *Galveston Yacht Basin, Inc.,* 727 F. 2d 330, 338 (5th Cir. 1984); *Karjala* v. *Johns-Manville Products Corp.,* 523 F. 2d 155 (8th Cir. 1975); *Borel, supra,* at 1089-90. In establishing the scope of a manufacturer's duty to warn, therefore, evidence of all known or foreseeable hazards posed by the product is relevant. Thus, in the instant case, evidence that abstention is a carcinogen was clearly probative of the nature and extent of the defendants' duty and corresponding breach.[11]

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> directions and warning, is not defective, nor is it *unreasonably* dangerous. . . . The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

[11]For evidence introduced at trial concerning the foreseeability of an increased risk of cancer following exposure to asbestos, see

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Although cancer evidence is relevant to the issue of the defendants' liability, we think that this ground for admission, standing alone, is insufficient under Federal Rule of Evidence 403 to justify the admission of the type and quantity of cancer evidence adduced by the plaintiff here. Jackson introduced no fewer than nine expert witnesses who tied asbestos exposure in some manner to an increased risk of cancer. Three of those experts specifically testified that Jackson in particular had a greater than fifty percent chance of contracting cancer. Johns-Manville and Raybestos-Manhattan argue that the district court abused its discretion in admitting the cancer evidence because the dire symptoms and consequences of the disease are so well known and feared by the general public that extensive evidence on the matter was likely to cause individual members of the jury to act out of unfair prejudice. If the cancer evidence is relevant only to the defendants' liability, we agree with the defendants that the danger of unfair prejudice outweighed its probative value.

Jackson offers, however, two other grounds for the admissibility of the cancer evidence: (1) to establish damages for reasonable mental anguish resulting from his increased risk of cancer and (2) to establish damages in connection with cancer as a future consequence of the complained of condition that is reasonably probable to occur. We think that either ground would justify the inclusion of the evidence in this case, provided, of course, that the damages of which the cancer evidence would be probative were available to Jackson as a matter of law. Thus, because we have decided to certify to the Mississippi Supreme Court

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Testimony of Dr. Gerrit Schepers, Record, Vol. 49, at 410-12; Testimony of Dr. David Ozonoff, Vol. 51, at 105; Testimony of Mr. Hugh Jackson, Vol. 53, at 1624-25.

the question whether these types of damages are recoverable by Jackson in the present context, *see infra* Part B3, the final decision as to the admissibility of the cancer evidence must await that court's response to our question. If the Mississippi Supreme Court holds that Jackson has no right in the instant case to recover damages either for cancer as a probative future consequence or for mental anguish for the fear of contracting cancer, then the cancer evidence was wrongly admitted and a new trial will be in order. If, however, the Mississippi Supreme Court rules that either category of damages is recoverable, the cancer evidence was properly admitted.[12]

B. Substantive Law—Punitive Damages, Mental Anguish and Probable Future Consequences

In the original appeal of this case, Johns-Manville and Raybestos-Manhattan argued that punitive damages should not be recoverable as a matter of law in the context of asbestos litigation because of certain public policy considerations described below. The defendants also insisted that the district court erroneously allowed the jury to award compensatory damages for mental anguish allegedly

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[12]We recognize that, if the Mississippi Supreme Court rules that damages for mental anguish are recoverable in this context, but that damages for cancer as a probable future consequence are not, then it could be claimed that the type and quantity of cancer evidence in this case continues to pose too great a risk of unfair prejudice. This distinction between these grounds for admissibility of the cancer evidence would require a different balancing analysis under rule 403. Because the defendants took an all-or-nothing position at trial with respect to the cancer evidence and have maintained this position on appeal, we do not address this issue. Clearly, if the evidence was admissible as to one kind of damages, but not as to the other, a limiting instruction would have been in order upon request. No request for such an instruction was made in this case.

associated with Jackson's increased risk of contracting cancer.[13] Finally, before the en banc court the defendants

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[13]The district court never specifically instructed the jury that Jackson could recover such damages. Instead, the district court stated that the following were recoverable:

> If you find from a preponderance of the evidence in this case that the plaintiff, James L. Jackson, is entitled to a verdict, against any one or more of the defendants herein, then in that event it would be your sworn duty to fix the amount of your verdict at a sum which will fairly and reasonably compensate him for his injuries, sufferings or conditions of pulmonary disease proved by a preponderance of the evidence to have been sustained as a proximate result of exposure to asbestos fibers emitted from the product or products of a defendant or defendants herein. In calculating the amount of the plantiff's damages, if any, and these are called either actual or compensatory damages, it would be your sworn duty to take into consideration the following elements:
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> 1. The amount of wages, if any, lost to date by the plaintiff.
>
> 2. Any impairment of Mr. Jackson's future wage-earning capacity.
>
> 3. The reasonable value of the medical bills and expenses including doctor's fees, hospital services, and medication required to date, for the necessary treatment of his injuries complained of.
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> 4. The reasonable and necessary expenses to Mr. Jackson for doctor, hospital and medication charges which you find from the evidence in this case are reasonably expected to be required in the future for the necessary treatment of his complained of condition.
>
> 5. All physical pain and mental anguish suffered by him to date and such as he is reasonably certain to suffer in the future as a direct result of his complained of condition.
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> In this regard also, you may consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from the injury.

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argued that the district court was also erroneous in allowing the jury to award compensatory damages for cancer as a probable future consequence of Jackson's present condition. Because a plaintiff under Mississippi law can usually recover both types of compensatory damages if they are sufficiently tied to the defendants' wrong, *see Entex, Inc.* v. *Rasberry,* 355 So. 2d 1102, 1103 (Miss. 1978) ("where . . . future consequences from an injury will ensue, recovery therefor may be had, but such future consequences must be established in terms of reasonable probabilities"); *Sears, Roebuck & Co.* v. *Devers,* 405 So. 2d 898, 901 (Miss. 1981) (damages for mental anguish are recoverable when they are the natural and recoverable result of a wrong), whether these damages are available in the instant case may depend on the nature of the actionable injury. If the actionable injury here was the exposure to asbestos, as Jackson insists, he may be entitled to recover damages for those future consequences, such as the manifestation of cancer, that could be established in the mental suffering that is the direct consequence of the increased risk of cancer caused by the asbestos exposure. If, on the other hand, exposure to asbestos is regarded as too abstract an invasion, either as a general rule or in the context of latent disease, mass tort litigation, and instead Jackson's asbestosis itself is considered to be the only actionable harm, Jackson may have no right to recover these damages since asbestosis alone does not result in an increased risk of cancer. In voting to rehear the case en banc, this court requested the parties additionally to consider in their

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Record, Vol. 56, at 2444. These instructions are sufficiently broad to have allowed the jury, on this record, to award damages for Jackson's asbestosis and mental anguish and for cancer as a probable future consequence of his exposure to asbestos.

briefings whether this case was an appropriate one for the fashioning and imposition of federal common law.[14] Upon careful review of the excellent briefs submitted and the applicable caselaw, we now conclude that Mississippi law governs the resolution of the punitive damages, cancer as a probable future consequence, and mental anguish issues. Moreover, because Mississippi courts have yet to give a definite answer to the questions these issues pose, we have determined to certify all three issues to the Mississippi Supreme Court.

1. The Unique Nature of Asbestos Litigation.

In advocating the application of federal common law, both the defendants and the dissent distinguish the instant case from routine personal injury actions on the ground that asbestos-related injuries have become a national problem of immense proportions. Studies cited in the panel opinion[15] indicate that in the last forty years over 21 million

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[14]Our request read in pertinent part as follows:

> Please refer to the discussion in Part VI of the panel opinion, which appears subsequent to headnote [23] (727 F. 2d 526-530). Supplement or include in your briefing in this case a discussion of what consideration *Erie R.R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838, and subsequent interpretative decisions would permit this court to give to the impact of punitive damage awards on future federal court litigants notwithstanding Mississippi rules of substantive law.

[15]*See* 727 F. 2d at 524. Studies cited include Selikoff, Report to the U.S. Department of Labor, Disability Compensation for Asbestos-Associated Disease in the United States (1982), *reported in* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,* 52 Fordham L. Rev. 37, 37 n. 1 (1983); *Congress Grapples with Toxic Torts,* Nat'l

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Americans have been significantly exposed to asbestos. These studies further estimate that at least 200,000 people will die from asbestos-related cancer alone by the end of the century. As a result of the widespread exposure to asbestos, over 20,000 personal injury lawsuits have already been filed, seeking billions of dollars in damages. Johns-Manville reports that it alone is named as a defendant in over 14,000 suits, almost 10,000 of which seek substantial punitive damages in addition to compensatory relief.

It is feared that, unless present plaintiffs are soon limited in the damages they can collect, early recoveries will create a substantial possibility that the responsible corporate entities will be unable to satisfy the compensatory awards of future claimants. Defendants, the dissent, and a number of commentators[16] urge that, specifically, assessments of punitive damages not only threaten to destroy the viability of enterprises through which loss distribution can be accomplished, but also are incapable of fulfilling their dual functions of punishment and deterrence in the face of the asbestos industry's virtual limitless liability. Similarly, awards for mental and prospective damages related to possible future manifestations of a disease, theoretically recoverable when exposure is considered as the actionable injury, require asbestos companies to expend their resources at a more accelerated pace to the detriment of future plaintiffs. To the defendants and the dissent, these problems and the need for national solutions form an ample basis for the formulation of federal common law.

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L. J., Jan. 31, 1983, at 30, col. 1, *reported in* Seltzer, *supra*. *See also In re Johns-Manville Corp.*, 36 B. R. 743, 746 (Bankr. S.D.N.Y. 1984) (projection of Johns-Manville's potential liability); Special Project, *supra* note 9, at 580-81.

[16]*See infra* note 22.

2. The Question of Federal Common Law.

Any discussion of federal common law must begin with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In *Erie*, the Supreme Court established that federal courts do not have the general law-making powers commonly exercised by state courts. The *Erie* Court held that federal courts, as courts of limited jurisdiction, are empowered to make only those laws authorized by the Constitution or by enactment of Congress. 304 U. S. at 78, 58 S. Ct. at 822. Nevertheless, since *Erie*, the Supreme Court has recognized "a responsibility in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern." *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U. S. 77, 95, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981). These instances, however, are "few and restricted." *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651, 83 S. Ct. 1441, 1444, 10 L. Ed. 2d 605 (1963). With respect to the kinds of cases that do raise issues of "uniquely federal concern," the Supreme Court has most recently stated:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641, 101 S. Ct. 2061, 2067, 68 L. Ed. 2d 500 (1981).

Johns-Manville and Raybestos-Manhattan, while conceding that Congress has yet to take any action to remedy the problems of asbestos exposure, present what can be taken as two arguments for the proposition that these problems involve uniquely federal concerns justifying the displacement of state law. First, the defendants, echoed by the dissent, argue that the potential conflict among plaintiffs for the limited resources of the asbestos companies is analogous to the interstate conflicts over water rights and pollution that have been held to involve uniquely federal interests. According to the defendants, just as one state cannot divert the waters of a river flowing partially within its borders without regard for those downstream, one group of states should not be able by allowing the recovery of noncompensatory damages to divert and deplete scarce corporate resources at the expense of injured plaintiffs in other states.

We find this argument, although superficially plausible, to be ultimately unpersuasive. Defendants in drawing their analogy necessarily rely on such cases as *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938), and *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972). *Hinderlider* concerned the allocation of water rights between Colorado and New Mexico in regard to the La Plata River, which flowed from Colorado to New Mexico and was used benefically by both states. The Supreme Court, in requiring the river to be equally apportioned, held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." 304 U. S. at 110. Similarly, in *Illinois* v. *City of Milwaukee*, the Supreme Court, faced with a dispute over water pollution in Lake Michigan, a body of water bounded by four states,

found that the conflict was fundamentally interstate in nature and thus touched basic interests in federalism. The Court held that, in such a situation, federal common law applied. 406 U. S. at 105 & n. 6, 92 S. Ct. at 1393 & n. 6.

In both cases, the essential conflict was between states as quasi-sovereign bodies over shared resources. Under such circumstances, a single state's statutes or decisions could not be considered conclusive. In the realm of asbestos litigation, on the other hand, any conflict between plaintiffs, even assuming one to exist, may transcend state lines but does not involve the rights and duties of states as discrete political entities. A conflict over the resources of the asbestos industry would be not merely between plaintiffs in different states but between plaintiffs in the same state and between past, present, and future plaintiffs. Clearly, if federal courts are to remain courts of limited powers as required under *Erie*, a dispute over a common fund or scarce resources cannot become "interstate," in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.

[5] Second, the defendants argue that there is a uniquely federal interest in assuring compensation to injured persons and in maintaining government asbestos suppliers. Both interests, the defendants insist, would be substantially served by the creation of federal rules restricting the types of damages recoverable in asbestos suits. We think the defendants in making this argument misconceive the nature of the uniquely federal interest requirement. "Uniquely federal interests" are not merely national interests, and the existence of national interests, no matter their significance, cannot by themselves give federal courts the authority to supersede state policy. Indeed, as the Supreme Court recently stated, "[t]he enactment of a federal rule in an area of national concern, and the decision

whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee* v. *Illinois*, 451 U. S. 304, 312-13, 101 S. Ct. 1784, 1789-90, 68 L. Ed. 2d 114 (1981) (*Milwaukee II*). It is well-established instead that to be "uniquely federal" and thus a sufficient predicate for the imposition of a federal substantive rule, an interest must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign. *See, e.g., Texas Industries, supra*, at 641, 101 S. Ct. at 2067 (authority and duties of United States must be "intimately involved"); *Northwest Airlines, supra*, at 95, 101 S. Ct. at 1582 (uniquely federal concern is "the definition of rights and duties of the United States"); *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726, 99 S. Ct. 1448, 1457, 59 L. Ed. 2d 711 (1979) (federal law governs rights of United States arising under nationwide federal programs); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366, 63 S. Ct. 573, 574, 87 L. Ed. 838 (1943) (federal common law governs rights and duties of United States on commercial paper which it issues).

Although individual members and committees of Congress have expressed concern with the problem of asbestos litigation,[17] Congress itself has yet to make policy

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[17]Various proposals have been presented to the Congress concerning the widespread problems arising from the massive exposure to asbestos. *See* Product Liability Act, S. 44, 98th Cong., 1st Sess. (1983); Occupational Disease Compensation Act of 1983, H. R. 3175, 98th Cong., 1st Sess. (1983); Asbestos Workers Recovery Act of 1984, S. 2708, 98th Cong., 2d Sess. (1984). To date, though, none of these has been enacted into law. Congress has recently, however, amended the Longshoremen's and Harbor Worker's Compensation Act with respect to claims related to occupational dis-

(Footnote Continued on Next Page)

on this issue. Moreover, defendants have been unable to point to any substantial right or duty of the federal government that would be directly affected by the outcome of this litigation. Any effect state law recoveries would eventually have on the government's ability to obtain needed materials is far too indirect to justify the imposition of federal common law. *See, e.g., In re "Agent Orange" Product Liability Litigation,* 635 F. 2d 987, 993 (2d Cir. 1980) (no federal policy at stake in action by war veterans against manufacturers of defoliants used in Vietnam War that is sufficient to warrant creation of federal common law), *cert. denied,* 454 U. S. 1128, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981); *cf. Miree* v. *DeKalb County,* 433 U. S. 25, 29-32, 97 S. Ct. 2490, 2493-97, 53 L. Ed. 2d 557 (1977) (federal interest in air travel insufficient basis for creation of federal law in action between private parties that will have no direct effect on United States or its treasury); *Bank of American National Trust & Savings Ass'n* v. *Parnell,* 352 U. S. 29, 33-34, 77 S. Ct. 119, 121, 1 L. Ed. 2d 93 (1956) (interest of government too speculative and remote in action between private parties that does not touch rights and duties of the United States). Similarly, ensuring the availability of compensation for injured plaintiffs is predominately a matter of state concern and, in the absence of congressional enactments, state law, both as to the extent of compensation available and punitive damages, must apply. As recently as last term, the Supreme Court reaffirmed this basic principle of American federalism when it stated in a related context: "Punitive damages have long been a part of traditional principles of state law. As noted above, Congress assumed that traditional principles of state

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(Footnote Continued From Preceding Page)

eases, including those resulting from the exposure to asbestos. *See* Longshore and Harbor Workers' Compensation Act of 1984, Pub. L. No. 98-426, 98 Stat. 1639.

tort law would apply with full force unless they were expressly supplanted." *Silkwood* v. *Kerr-McGee Corp.*, ___ U. S. ___, 104 S. Ct. 615, 625, 78 L. Ed. 2d 443 (1984).

A related interest that has been suggested to justify the exercise of federal judicial power in this case is the federal court's own interest in "doing justice." It could be argued that federal courts have an institutional interest in maintaining a federal judicial system that is fundamentally "just." While we are sympathetic to such an argument, it is clear that such an abstract, all-encompassing interest cannot form a sufficient basis upon which to rest the displacement of state law. First, we find implicit in *Erie* the idea that in diversity actions federal court concerns in a just judicial system cannot be used as a reason for supplanting substantive state policies. Second, certainly as a practical matter, the effect of resting assertions of federal judicial power on so vague an interest as "justice" would be to eviscerate *Erie* completely and thus ignore its constitutional underpinnings. Third, the Supreme Court itself has already rejected a similar interest in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). In that diversity case, the plaintiff agrued, *inter alia*, that the federal court's equitable powers and discretion constituted an exception to *Erie* and that, therefore the federal court was not bound by the state statute of limitations. The Supreme Court, in rejecting the plaintiff's claim, stated:

> But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

Id. at 108-09, 65 S. Ct. at 1469. A federal court's interest in "doing equity" is closely related to its interest in "doing justice." It is doubtful that the Supreme Court in *Guaranty Trust* would have been any more willing to displace state law if the plaintiff addditionally had successfully shown that the applicable state statute of limitations was "unjust." Obviously, if justice could be used as a justification for the naked exercise of federal judicial power, the Supreme Court's oft-repeated assertion that the instances in which federal common law governs are "few and restricted" would no longer be true. *Cf. Texas Industries, Inc., supra,* at 640, 101 S. Ct. at 2066 (denying rights of contribution against antitrust co-conspirators).

Finally, we note the impracticalities of fashioning a federal common law in the context of asbestos litigation. First, any decision by this court to displace state law would be effective only within our geographical jurisdiction. While it is of course possible that other circuits would in time follow our lead, at least one circuit has already expressly refused to apply federal common law in these circumstances. *See Moran, supra,* at 817 ("relief sought . . . may be more properly granted by the state or federal lesislature than by this Court"). Unless and until the Supreme Court imposses a similar federal common law on the country as a whole, any federal substantive rules fashioned by us would only exacerbate the alleged inequities among claimants, with punitive and certain types of compensatory damages being available outside the circuit but not within. Such a result, in turn, would encourage a massive effort at forum shopping to bring suits outside this circuit.

Second, we are unable to discern any governing principle of easy application for the imposition of federal common law in the asbestos context. Although the amount of recovery available to plaintiffs depends in large part on

the availability of punitive damages and the scope of the actionable injury, many other aspects of the litigation similarly play a significant role in determining the size of potential awards. The applicable limitations period for the bringing of an action, for example, has a direct impact on aggregate recovery and thus the availability of funds for future claimants. The simple fact is that, once the need to limit plaintiffs' recoveries is used to justify the creation of federal substantive rules precluding the recovery of punitive damages and narrowing the scope of the actionable injury, there would be no principled means of restricting the application of federal common law to other matters, either in the context of asbestos litigation or in relation to similar legal problems. As a consequence, federal courts would become increasingly responsible for establishing a general federal tort law in a manner we think is inconsistent with the teachings of *Erie* and the logic behind our federal system. *Cf. Parratt* v. *Taylor*, 451 U. S. 527, 544, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981) (due process clause not intended to be "a font of tort law to be superimposed upon whatever systems may already be administered by the States") (quoting *Paul* v. *Davis*, 424 U. S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976)).

Third, displacement of state law in asbestos cases would require federal courts to reexamine the major issues and principles involved in asbestos litigation, most of which are presently settled under state tort law. As a result, the progress of currently pending asbestos cases through the federal court system would come to a virtual standstill. The need to ensure quick resolution of the claims militates strongly against taking such action.

[6] In sum, we find that this case is not an appropriate one for the creation of a federal common law because of the absence of a uniquely federal interest and the practical problems that would attend the displacement of state law.

Although federal common law may at times be a "necessary expedient," *Milwaukee II, supra,* at 314, 101 S. Ct. at 1791 (quoting *Committee for Consideration of Jones Falls Sewage System* v. *Train,* 539 F. 2d 1006, 1008 (4th Cir. 1976) (en banc)), under our federal system Congress is generally the body responsible for balancing competing interests and setting national policy. There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation. Congress' silence on the matter, however, hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions. Displacement of state law is primarily a decision for Congress, and Congress has yet to act. *See Miree, supra,* at 32, 97 S. Ct. at 2495.[18]

3. Certification.

It remains for us to consider under Mississippi law the nature of the actionable injury and the availability of punitive damages in the asbestos context. Upon review of the relevant caselaw and the briefs of counsel, we find that these issues are currently unresolved under Mississippi jurisprudence and are appropriate for certification to the

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[18]Because we find that the imposition of federal common law is clearly not appropriate in this context, we have determined not to certify the question to the United States Supreme Court pursuant to 28 U.S.C. § 1254(3), as suggested by the dissent. *See Wisniewski* v. *United States,* 353 U. S. 901, 902, 77 S. Ct. 633, 634, 1 L. Ed. 2d 658 (1957) (per curiam) (certification only proper in rare instance when advisable in the proper administration and expedition of judicial business); *United States* v. *Perrin,* 131 U. S. 55, 58, 9 S. Ct. 681, 682, 33 L. Ed. 88 (1889) (question certified must pose "a real question of a difficult point of law"). *See generally* 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4038.

Mississippi Supreme Court pursuant to Mississippi Supreme Court Rule 46.[19]

As noted above, resolution of whether the district court erred in allowing Jackson to recover damages associated with the manifestation of cancer as a probable future consequence or for mental anguish resulting from his increased risk of cancer may depend under current Mississippi doctrine upon the nature of the actionable injury. This is so because asbestosis itself does not lead to an increased risk of cancer and under Mississippi law plaintiffs can only recover for mental suffering or probale future consequences that at the very least are the direct result of the actionable wrong. *See, e.g., Sears, Roebuck & Co., supra,* at 901. Mississippi courts, however, have yet to consider how abstractly to characterize the wrong involved in the latent disease and mass tort context, and we are reluctant to undertake the careful weighting of competing state policies that such a determination would entail. On the one hand, characterizing the injury as being the initial exposure might provide the plaintiff the traditional right under Mississippi

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[19]Mississippi Supreme Court Rule 46 provides:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeals of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Mississippi.

Government Employees Ins. Co. v. *Brown,* 446 So. 2d 1002, 1002 n. 1 (Miss. 1984).

Texas law which governed our decision in *Hansen* v. *Johns-Manville Prod. Corp.,* 734 F. 2d 1036 (5th Cir. 1984), provided no procedure to certify a question to that state's highest court.

law to recover in a single action present damages, damages for mental anguish, and those future damages resulting from defendants' wrongful act that can be established in terms of reasonable probabilities. *See, e.g., Entex, Inc., supra,* at 1104. Substantial awards for mental anguish or for prospective damages, on the other hand, might jeopardize, especially with respect to mass torts, the viability of the enterprises that are to accomplish the strict liability goal of loss distribution.[20] Because of the potential complexity of the policy analysis required here, certification is needed to reach a principled rather than a conjectural result. *See State of Fla. ex rel. Shevin* v. *Exxon Corp.*, 526 F. 2d 266, 275 (5th Cir.), *cert denied,* 425 U. S. 930, 96 S. Ct. 1659, 48 L. Ed. 2d 172 (1976); *see also,* Brown, *Certifica-*

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[20]Contrary to the defendants' contention and the panel opinion, Mississippi statute of limitations cases describing under what circumstances specific limitations periods begin to run do not necessarily provide a ready answer to this problem. In a statute of limitations case, a court must balance the plaintiff's need to obtain at least adequate compensation with the defendant's need to be secure against stale claims and to plan for the future without the uncertainty of potential liability. *Wilson* v. *Johns-Manville Sales Corp.,* 684 F. 2d 111, 119 (D.C. Cir. 1982). The plaintiff in the statute of limitations context desires his action to be construed as accruing at the manifestation of the disease. Here, however, the parties clearly have different respective interests. Jackson, for instance, is arguing that the actionable harm was the asbestos exposure, not the manifestation of the disease. As the District of Columbia Circuit Court of Appeals observed in *Wilson, supra,* at 118 & n. 36, there is no reason to think that the dimensions of a claim are inevitably identical for all purposes. Statutes of limitations, as well as definitions of actionable injuries, "'find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles.'" *Id.* at 118 (quoting *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314, 65 S. Ct. 1137, 1142, 89 L. Ed. 1628 (1945)).

tion—Federalism in Action, 7 Cumberland L. Rev. 455 (1977).[21]

[7] In regard to the availability of punitive damages, a similar problem exists. Although punitive damages are generally available if the defendants have engaged in "wanton, gross or intentional conduct in the nature of an independent tort," *State Farm Mutual Automobile Co.* v. *Roberts,* 379 So. 2d 321, 322 (Miss. 1980), a plaintiff has no absolute right under Mississippi law to punitive damages. Mississippi courts are clearly able to consider policy in determining in a given case whether punitive damages are appropriate at all or whether a particular award is excessive. *See T.C.L., Inc.* v. *Lacoste,* 431 So. 2d 918 (Miss. 1983); *Tideway Oil Programs, Inc.* v. *Serio,* 431 So. 2d 454, 460 n. 1 (Miss. 1983). We have found no case in which the Mississippi Supreme Court has considered the availability of punitive damages in a mass tort context such as the one

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[21]While we think that under current law the availability of mental anguish damages and damages for cancer as a probable future consequence depends upon a common issue of law, we certify both questions to the Mississippi Supreme Court. We fully recognize the possibility that the Mississippi Supreme Court may determine that, regardless of the nature of the actionable injury, in the mass tort context one type of damages should be recoverable but not the other. We further note that the Supreme Court of Mississippi, of course, will not be bound in any way by the perimeters of the certified questions. We have often stated:

> [T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

Martinez v. *Rodriguez,* 394 F. 2d 156, 159 n. 6 (5th Cir. 1968).

presented here. Thus, in light of the growing controversy that has in recent years surrounded the availability of punitive damages in such contexts,[22] we think it is in the interests of the best administration of justice to allow the Mississippi Supreme Court the opportunity to weigh the competing interests at stake and to declare authoritatively Mississippi policy on this issue. *See Barnes* v. *Atlantic & Pacific Life Insurance Co.*, 514 F. 2d 704, 706 (5th Cir. 1975) ("When the state law is in doubt especially on the underlying public policy aims, it is in the best administration of justice to afford the litigants a consistent final judicial resolution by utilizing the certification procedure.").

Although we have determined to certify these issues, we first, as is our usual practice, request the parties to submit a joint statement of facts and stipulated questions to be certified to the Mississippi Supreme Court. Following receipt of a response, we will transmit the formal certificate as well as the record in the case and copies of the parties' briefs, including any briefs submitted in response to our inquiry herein.

CERTIFIED.

ALVIN B. RUBIN, Circuit Judge, concurring.

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[22] *See, e.g.*, Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976); Seltzer, *supra* note 15; Comment, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L. J. 1797 (1979); Comment, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 Pac. L. J. 1273 (1982); Szuch & Shelly, *Time to Eliminate Punitive Damages*, Nat'l L. J., Feb. 28, 1983, at 13, col. 1. *See also Roginsky* v. *Richardson Merrell, Inc.*, 378 F. 2d 832, 838-41 (2d Cir. 1967) (describing problems with awarding punitive damages in mass tort context).

Although I think that diversity cases should not be reheard en banc,[1] I concur in this opinion because we are remanding the case to obtain the opinion of the state Supreme Court, which alone can furnish us an authoritative state-law decision on issues involved in hundreds of cases pending in the federal district courts.

CLARK, Chief Judge, with whom GEE, GARZA, POLITZ and E. GRADY JOLLY, Circuit Judges, join, dissenting.

The nub of the disagreement with the majority opinion lies in its essential premise that justice is too abstract, too all-encompassing a concept to serve as a basis for supplanting state substantive law in diversity cases. Therefore, the aim of this dissent will be to develop the values that support the premise that existing precedent creates a duty to ask the Supreme Court of the United States to instruct us on whether federal common law should be applied in this litigation.

The majority labels this a "Mississippi diversity case." While this is literally accurate, it is misleading. *Jackson* is a seminal case that will control the rights of untold thousands of litigants in this court. The panel opinion cannot form a proper premise for dissent, for, like the majority, it too gave less than adequate consideration to the impact of the unprecedented volume of the asbestos litigation in the federal court system. The number of the claims is already legion and increasing at a geometric rate. Compensation for these actions, most of which are founded on the concept of liability without fault, must be paid by a finite and indeed limited group of business entities and

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[1] *See Sturgeon* v. *Strachan Shipping Co.*, 731 F. 2d 255, 260 (5th Cir. 1984) (en banc) (Rubin, J., dissenting); *Edwards Co.* v. *Monogram Indus., Inc.*, 730 F. 2d 977, 987 (5th Cir. 1984) (en banc) (Rubin, J., concurring); *cf. Nash* v. *Estelle*, 597 F. 2d 513, 534 (5th Cir. 1979) (en banc) (Rubin, J., dissenting).

insurers. These facts prevent consideration of James Leroy Jackson's case in isolation. They also preclude our dealing with Jackson's and his cohorts as a group of litigants whose cases should be governed by Mississippi law under ordinary diversity principles. The only just resolution this court can achieve here is to certify to the United States Supreme Court under 28 U.S.C. § 1254(3) the question of whether federal common law must be developed to govern this uniquely interdependent mass of tort litigation.

I

In the fifteen years since the filing of the first suits, the field of asbestos litigation has exploded.[1] We are confronted with an already astronomical and still growing number of plaintiffs seeking individual recoveries against a finits pool of assets belonging to a relatively small group of defendants. Because the insidious diseases giving rise to these claims have latency periods ranging up to forty years, the injuries of many plaintiffs will not become manifest for years to come. There is a real and present danger that the available assets will be exhausted before those later victims can seek the compensation to which they are entitled.[2] This threat is exacerbated by inconsistent state policies pertaining to many elements of litigation. The

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[1]For the reader's convenience, factual information detailing the current volume of this litigation and its projected future impact has been placed in the Appendix.

[2]The reality of this danger is emphasized by the fact that three asbestos companies including Johns-Manville, the dominant figure in the industry, have entered Chapter 11 bankruptcy proceedings. All have cited the projected liabilities from the products suits liability as their reason for filing bankruptcy. *In re Johns-Manville Corp.*, 36 B. R. 743, 745 (Bkrtcy. S.D.N.Y. 1984); *In re Amatex Corp.*, 30 B. R. 309, 310 (Bkrtcy. E.D. Pa. 1983); *In re U.N.R. Industries, Inc.*, 29 B. R. 741, 743 (N.D. Ill. 1983).

clearest sources of this danger are the two major concepts at issue here: the availability of punitive damages and the propriety of restricting the accrual of each of the many distinct diseases that can result from asbestos exposure to the actual date of manifestation. In this unique context, the continued case-by-case implementation of these policies on an inconsistent basis will permit initial plaintiffs, through disproportionate awards, to consume the only assets available to compensate later-filing but equally deserving plaintiffs.

Each of the many states touched by this litigation has a strong interest in ensuring that its citizens receive full compensation, regardless of when their individual claims accrue. Uncompensated victims could directly or indirectly burden the state itself. However, no state can control the tort law of another. A state seeking to protect its own citizens can only shape its law to maximize the recovery of its own early plaintiffs, so that at least those individuals will not be impeded in the legal scramble for a share of insufficient assets.

We do not deal here with a question of limited scope and impact such as the application of a state statute of limitations governing breach of trust actions as did *Guaranty Trust*[3] on which the majority relies. As Justice Frankfurter pointed out, even before *Erie* such statutes generally governed diversity suits.[4] Rather, we confront a sequence of massive tort claims that has unparalleled geographic and financial dimensions. We confront cases where the application of divergent governing principles can destroy the rights of similarly situated claimants. We confront no less than a challenge to our purpose as courts.

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[3] *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

[4] *Id.* at 1470.

II

Just as the rote application of inconsistent state laws cannot resolve this problem, so too, any action by this inferior appellate court alone would be ineffective. Our creation of a federal common law to govern asbestos actions within the Fifth Circuit would only eliminate inequities among federal claimants in the area we serve. Courts outside our jurisdiction could continue to apply disparate policies. The question of resolving a proper federal common law rule must be certified to the Supreme Court of the United States—the only judicial forum capable of providing the right answer.

III

Modern strict liability and, indeed, almost all tort principles are products of state law. Since *Erie Railroad* v. *Tompkins* state law principles have governed diversity trials. This dissent invokes no departure from that well established rule. However, there is equally authentic authority that federal forums must impose an overarching rule to accomplish justice in litigation where the application of inconsistent rules generated by states with conflicting interests can consume the purposes of the state law itself.[5] Even in diversity cases we do not become courts of the states. That is why, with fidelity to the freedom of

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[5]On the day Justice Brandeis write in *Erie Railroad Co.* v. *Tompkins*, "There is no federal *general* common law," 58 S. Ct. 817, 822 (1938) (emphasis added), in *Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 58 S. Ct. 803, 811, 82 L. Ed. 1202 (1938), another case between private parties, he also wrote: "whether the waters of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive."

the Supreme Court to apply state substantive law in diversity cases, it is necessary to remember that we always retain the duty to perform our tasks under our system of federalism.

The instances where the formulation of federal common law is justified are "few and restricted."[6] Federal common law only governs situations where "our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control."[7] Here the competing state interests presented by the nationwide flood of asbestos litigation place this case well within the second category as the interstate nature of the controversy makes the application of state law inappropriate.

IV

The majority concludes that federal common law is available to resolve an interstate conflict only if the essential conflict is between the states as "discrete political entities." I respectfully disagree. This conclusion ignores Justice Burger's statement that the application of federal common law is not precluded in all matters involving only private citizens.[8] It is inconsistent with *Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 58 S. Ct. 803, 811, 82 L. Ed. 1202 (1938), the companion case to *Erie* in which Justice Brandeis announced the continuing vi-

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[6] *Wheeldin* v. *Wheeler*, 373 U. S. 647, 83 S. Ct. 1441, 1445, 10 L. Ed. 2d 605 (1963).

[7] *Texas Industries, Inc.* v. *Radcliff Materials*, 451 U. S. 630, 101 S. Ct. 2061, 2067, 68 L. Ed. 2d 500 (1981).

[8] *Miree* v. *DeKalb County*, 433 U. S. 25, 97 S. Ct. 2490, 2496, 53 L. Ed. 2d 557 (1977) (Burger, C. J., concurring).

tality of federal common law under the proper circumstances.[9] *Hinderlider* itself was an action to enforce private rights of a Coolrado corporation.

The basis for *Hinderlider* was an earlier water apportionment case, *Kansas* v. *Colorado,* 206 U. S. 46, 27 S. Ct. 655, 665-67, 51 L. Ed. 956 (1906). In *Kansas,* the Court ruled that in interstate dispute over the water in a nonnavigable stream was necessarily subject to federal common law because there was no viable means of resolving the conflict under state law. Therefore, the Court was obliged to formulate a body of federal common law to "settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." *Id.* at 667.

Although both *Hinderlider* and *Kansas* specifically addressed the apportionment of water, their underlying rationale governs the equitable division of any scarce resource between citizens of different states where conflicting state interests make the use of either state's law inappropriate The asbestos cases present this precise quandry. The finite pool of assets available to satisfy an infinite number of claimants is an identical value to the limited water available to serve many riparian owners.

An equitable resolution of this nationwide competition for scarce assets is surely as important to the basic interests of federalism as the equities invoked to justify the formulation of a common law of nuisance to resolve the dispute between the several bordering states over the pollution of Lake Michigan.[10]

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[9]*See Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 84 S. Ct. 923, 939, 11 L. Ed. 2d 804 (1964).

[10]*Illinois* v. *City of Milwaukee,* 406 U. S. 91, 92 S. Ct. 1385, 1393-94 & n. 6, 31 L. Ed. 2d 712 (1972).

V

Although certainly not presuming to tell the Supreme Court what course of action to take, it is appropriate, in seeking instructions, to say what divides us. We are not just divided on whether to reach for a single judicial resolution through Supreme Court certification, but also on whether that resolution should be left to state law. Our uncertainty is demonstrated by the conflict between the reasoning of the panel and the en banc majority on the substantive issues posed.

In capsule, the panel found punitive damages inappropriate in a mass tort context. Repealed awards of "smart money" for the same conduct do nothing to deter socially undesirable behavior. The enormous liability imposed by the compensatory awards in these cases has already achieved such deterrence. Aside from the inequity resulting from the fact that some states do not premit such awards, they carry the seeds to ultimately defeat the basic purpose of product liability law—to ensure that the manufacturers of a dangerous product, not the injured consumers, bear the costs of the injury. If punitive awards to early-filing plaintiffs exhaust the assets, late-comers or the state of health and welfare programs must bear the costs of the injury. These are values that no single-case application of any state's law can be expected to consider.

The panel opinion also explains that separate accrual dates for a cause of action for each of the diseases which may result from asbestos exposure is vital to ensuring a rational and equitable distribution of available assets. In some cases asbestos exposure does lead to cancer. Present experience indicates, however, that the majority of individuals exposed do not develop the disease. If a plaintiff who does not have asbestos-related cancer is allowed to recover for cancer damage because he finds a medical wit-

ness who will opine that there is a reasonable probability that he may later develop the disease, that individual's damage award will be a windfall if the disease never materializes. That windfall may leave later plaintiffs unable to secure compensation for diseases actually suffered. Without uniform rules to govern this accrual procedure courts cannot ensure that such assets as are available will be distributed to claimants in proportion to injuries suffered. Such claims must mature only as each disease is diagnosed so that each plaintiff may bring separate claims based on facts, not speculation, and receive proper compensation. Only a single source of authority can avoid the destruction of the rights of valid claimants by the application of inconsistent rules generated by forums with inconsistent and competing interest.

VI

The majority says, and we agree, that legislation would be the prefered solution to the dilemma of providing an adequate scheme for the proper distribution of compensation. But Congress has failed to enact any of the asbestos compensation bills proposed to date.[11] Courts enjoy no comparable ability to refuse to decide cases brought before them. We must decide Jackson's claims. But it is not just Jackson's rights which are at stake. Literally, the rights of tens of thousands of claimants in cases presently being litigated depend on what we do. Untold thou-

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[11]Asbestos Workers Recovery Act of 1984, S. 2708, 98th Cong., 2d Sess. (1984); Occupational Disease Compensation Act of 1983, H. R. 3175, 98th Cong., 1st Sess. (1983); Product Liability Act, S. 44, 98th Cong., 1st Sess. (1983); Occupational Health Hazards Compensation Act, H. R. 5735, 97th Cong., 2d Sess. (1982); Asbestos Health Hazards Compensation Act, S. 1643, 97th Cong., 1st Sess. (1981); Asbestos Health Hazards Compensation Act, H. R. 5224, 97th Cong., 1st Sess. (1981).

sands more who have not yet manifested the symptoms of the insidious diseases that can result from asbestos fibre inhalation also depend upon our decision. We cannot wait to see if the impasse in Congress ultimately will be broken by lawmaking.

The Supreme Court, as the only institution other than Congress capable of imposing the uniformity necessary to resolve this problem in a just manner, should be afforded the chance to deal with the singular problem presented by these cases. That Court has the power to formulate federal common law which will ensure equitable compensation for all claimants. Its ability to address the controlling issues with a single voice is not only necessary for just resolution of pending litigation; it is even more important to expeditious and equitable settlement of claims. A uniform set of rules would not only protect the rights of individual claimants and the effective functioning of the judicial system, but would also aid the efforts of the asbestos companies and their insurers to develop an effective procedure for resolving these disputes on a rational basis without resorting to the courts. The potential for disparate outcomes in the different states could encourage many plaintiffs to remain in the courts rather than resorting to a unified nationwide facility for resolving these disputes.[12]

Making judicial rules will not preclude legislative resolution. If Congress does decide to act in this area, federal common law declared by the courts would be preempted. However, the possibility of a future legislative solution does not justify a refusal by this court to deal properly with the cases now before us.[13]

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[12]*See* Appendix at 13 for a discussion of the alternative dispute resolution mechanisms proposed by the asbestos companies and their insurers.

[13]*See Illinois* v. *City of Milwaukee*, 92 S. Ct. at 1395.

Rather than infringing the perogatives of Congress, immediate unified judicial action would enhance the ability of Congress to address a recognized problem. All the asbestos compensation legislation proposed is premised on the assumption that asbestos manufacturers will provide most, if not all, of the necessary funding. This option will be foreclosed if these assets are exhausted prematurely by excessive awards to current plaintiffs. Moreover, the interests of individual states in protecting their claimants with later maturing disease will be facilitated and any unseemly conflict between state law rules will be eliminated.

VII

Jackson's legal rights have been a long time maturing. However, the overriding importance of their proper development makes the minor delay in certifying these issues to the single forum that possesses the power to provide an effective remedy relatively insignificant. A Supreme Court decision not to answer the questions certified, or an answer that a federal common law rule should not be applied can be quickly given. Because of the importance of an affirmative substantive response to the myriad asbestos cases confronting the federal courts, any delay resulting from a certification procedure that would deal with the merits certainly would be worth the wait. The decision not to ask is an opportunity irretrievably lost.

Since the majority is unwilling to request instruction, it should not certify the issues proposed to the Supreme Court of Mississippi. This court's refusal to reconsider en banc its decision in *Hansen*,[14] the issuance of its mandate in that case before today's case was decided, coupled with

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[14] *Hansen* v. *Johns-Manville Products Corp.*, 734 F. 2d 1036, 1040-42 (5th Cir. 1984) (declaring that Texas state law controlled the availability of punitive damages).

loss of any chance to obtain uniform rules from the Supreme Court, eliminate any need to consider such certification. Despite the absence of clear controlling state court precedent as to whether punitive damages should be available in product liability actions and as to whether actions can mature for diseases before they are diagnosed, there can be no doubt that the Supreme Court of Mississippi would hold that Mississippi citizens should not be denied the right to claim punitive damages awards and to seek recovery for probable future diseases equal to the protections of law now accorded to citizens in other states. Any possibility that the Mississippi court would take the approach predicted in the panel opinion is gone.

VIII

The matters discussed in this part are internal to this court and do not involve issues to be certified. Except for the following response to the majority's discussion of the application of Rule 403 to the trial court's rulings on the admissibility of cancer evidence, the panel opinion sufficiently sets forth the reasons why we cannot concur in Part II A.

In Part II A.2 of its opinion the majority addresses the trial court's ruling admitting cancer evidence. Relevance, probity, and prejudice are dealt with separately as they relate to three issues: (1) the scope of a product liability defendant's duty to warn and test; (2) damages for mental anguish, and (3) damages due to cancer as a probable future consequence of asbestos exposure. Dealing with these issues as though they could be separated in result produces a tentative ruling that creates confusion without providing meaningful guidance to trial courts in terms of striking the Rule 403 balance. As we have explained above, the majority's indefinite suggestion is written in the sand. If the Mississippi Supreme Court answers

either of the certified questions in the affirmative, they will meet the suggestion.

Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . ." The Advisory Committee notes that certain circumstances in a case can call for the exclusion of evidence which is of unquestioned relevance. In explaining the balancing test required by the rule, they classify evidence which might induce a decision on a purely emotional basis as the most harmful. "Unfair prejudice" is expressly defined as an undue tendency to suggest a decision on an emotional basis. Finally, the Committee note requires that consideration be given to the probable lack of effectiveness of a limiting instruction and the availability of other means of proof.

This circuit en banc has considered the application of Rule 403 in a criminal case context, *United States* v. *Beechum,* 582 F. 2d 898 (5th Cir. 1978), cert. denied, 440 U. S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979). There, we required courts to look at the "incremental probity" of the evidence in question in analyzing the offering party's need to make this form of proof and the tendency of the questioned evidence to invite an irrational decision.

Applying these standards, we believe that as to each individual issue, and collectively for this single trial, unfair prejudice—a decision based on emotion not reason—outweighs probity—the need for the evidence to prove Jackson's case.

As to the first issue—the scope of the defendant's duty to warn and test—proof that the inhalation of asbestos fibers can cause cancer is clearly relevant, but not the *sine qua non* of plaintiff's case. It has only incremental probity. He proved that inhalation of asbestos fibers has produced damaging, life threatening and life shortening consequence in his body. Conceding *arguendo* that the duty to warn or

test could be heightened by the incremental difference in dangerousness of a product that caused only asbestosis as opposed to a product that could cause both asbestosis and cancer, the difference is one of slight degree. In the real world, the duty to warn and test would be substantially identical in either case. The other side of the problem—undue prejudice—flows from the fact that beyond doubt proof of cancer, a dread disease because of its sequela and the lack of medical knowledge to control or cure it, is highly prejudicial and evokes the strongest of emotions. This prejudice must be coupled with the lack of effectiveness of any limiting instruction to eliminate the emotional reaction from the minds of the jury. Looking just at the first issue in Jackson's case, we submit that as a matter of law the 403 balance should be struck in favor of excluding cancer evidence. In any event, the balance ought not rise or fall with how many witnesses are used to prove the carcinogenic propensities of the product.

Moving to the majority's second element — the establishment of damages for mental anguish — we note at the outset that in the entire testimony of Jackson and his wife, the only witnesses who testified as to his mental state, neither consideration of an increased risk of contracting cancer nor the probability of contracting the disease was ever mentioned. Clearly, Jackson did not prove that he suffered any mental anguish because his work around and with asbestos had increased his risk of contracting cancer. While an increased risk of cancer could be critical proof where a plaintiff testifies to mental anguish based upon that hazard, Jackson established no need to prove that increased risk in this case.

The majority's final compartment—damages for cancer as a probable future consequence of Jackson's past injury—is one that in our view makes this whole discussion academic. If the reasons outlined in the panel opinion are

accepted, Jackson's cause of action for that future prospect has not yet materialized. Rule 403 would say that he should be able to make that proof only when and if he contracts cancer. Alternatively, if, for the reasons set out above, the question of maturity of a cause of action for cancer is certified to the Supreme Court of the United States, any ruling on admissibility of cancer proof under Rule 403 must await that answer. If the federal common law (or Mississippi law under the majority's proposed certification) permits a present action for a potential disease, it will certainly change the other weighings discussed. If cancer evidence is admitted for any purpose, it brings the hair of prejudice with the hide of probability for all purposes.

IX

In sum, the asbestos-related litigation presents a flood of interrelated actions which cannot properly be decided as individual actions or under the legal rules of any single state. Unless the dependent rights of all present and future claimants are considered by the only forum capable of devising a single appropriate response to basic issues that affect the economic vitality of the compensation fund, disparate awards to early claimants can destroy the courts' ability to do justice. The asbestos litigation presents one of the few and restricted instances where formulation of federal common law is justified under the strictures defined by existing precedent. Given our statutory right to seek instructions from the Supreme Court, our duty is not done unless we ask. Certification to the Mississippi Court will only produce delay.

X

We should certify the following questions to the Supreme Court of the United States under 28 U.S.C. § 1254 (3):

1. Should federal common law limit or prohibit the award of punitive damages in litigation asserting strict liability or negligence rights against manufacturers and distributors of asbestos or products containing asbestos.

2. Should federal common law establish uniform rules for measuring the accrual of latent causes of action for separate diseases related to the manufacture and distribution of asbestos or products containing asbestos?

Because the court declines to so certify, we respectfully dissent.

APPENDIX

DIMENSIONS OF ASBESTOS LITIGATION

No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure. By 1981, only eight years after the decision in *Borel* v. *Fibreboard Paper Products Corp.*, 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 419 U. S. 869, 95 S. Ct. 127, 42 L. Ed. 2d 107 (1974), it had become the largest area of product liability litigation, far surpassing the number of cases generated by the controversies over Agent Orange, the drug DES, the Dalkon Shield intrauterine device, or even automobile defects.[1] col. 1.

Between the early 1970's and 1982 the asbestos companies and their insurers expended over $1 billion in litigation

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[1]Nat'l L. J., Oct. 19, 1981, at 1, col. 1; *id.*, Aug. 18, 1980, at 1,

expenses, damage awards and settlements.[2] This figure does not include the costs incurred by state or federal governments, expenses and compensation in workers' compensation claims, or the costs resulting from the Chapter 11 proceedings initiated by Johns-Manville, Unarco, and Amatex.[3]

I. The Claimants

In August of 1982, approximately 21,000 claimants had filed product liability suits alleging asbestos-related injuries. Seven months later by March of 1983, the figure had risen to about 24,000 claimants.[4] Currently, new suits are being docketed at an average rate of 500 per month.[5]

A

There is no single authoritative estimate of the number of asbestos claims that ultimately may be filed. Recognized experts have produced widely disparate figures. Inconsistencies are understandable. Asbestos is pervasive throughout America. In the 1970's alone the country consumed between 608,000 and 876,000 short tons of asbestos a

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[2]Kakalik, Ebener, Felstiner, Haggstrom, & Shanley, *Variation in Asbestos Litigation Compensation and Expenses* v. (Institute for Civil Justice, Rand Corp. 1984) [hereinafter *Variation in Asbestos Litigation Compensation and Expenses*].

[3]*Id.*

[4]Kakalik, Ebener, Felstiner, Haggstrom, & Shanley, *Costs of Asbestos Litigation* 12 (Institute for Civil Justice, Rand Corp. 1984) [hereinafter *Costs of Asbestos Litigation*].

[5]Asbestos Litig. Rep. (Andrews) 9, 101 (Oct. 19, 1984); *see also* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by the Asbestos Litigation*, 36 Vand. L. Rev. 573, 580-81 (1983).

year.[6] The substance is used in over three thousand products commonly found in the home and work environments, including floor tiles, asbestos textiles, insulation, fireproof drapery, heat-resistant surfaces, acoustical ceilings, decorative building panels, and plaster or stucco.[7] Any exposure to this substance, even to a relatively minute amount, can precipitate the development of asbestos-related disease.[8] In particular, mesothelioma, an invariably fatal cancer, can result from extremely low exposure levels.[9] The long latency periods for asbestos-related disease, usually ranging between 15 and 40 years,[10] make it difficult to ever determine if all possible claimants exposed within a given time period have been identified. For example, many workers injured by asbestos exposure during World War II are only now filing claims.[11]

The problem is further complicated by the emergence of new and frequently unanticipated classes of plaintiffs. To date most cases have been filed by shipyard workers, asbestos product factory workers, and insulation workers. Now new groups of plaintiffs from different points along the line of distribution of asbestos are emerging. Potential claimants include warehouse workers, truck drivers, longshoremen, and spouses of workers exposed when the worker returned home covered with asbestos dust.[12]

Another growing area of potential suits arises out of asbestos use in the construction trade. The Environmental

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[6]Special Project, *supra*, note 5, 573, 578 n. 7, (citing to Asbestos Litig. Rep. (Andrews) 181-82 (Apr. 27, 1979)).

[7]*Id.*

[8]Selikoff, "Asbestos-Associated Disease," in *Asbestos Litigation* 21, 48 (W. Alcorn ed. 1982).

[9]*Id.* at 36.

[10]*Costs of Asbestos Litigation*, *supra* note 4, at 3.

[11]*Id.*

[12]Selikoff, *supra* note 8.

Protection Agency estimates that approximately 20% of commercial, residential, apartment, and federal buildings contain friable asbestos,[13]—asbestos in a form that can be reduced to powder by hand pressure, permitting the asbestos fibers to become dislodged and airborne.[14] Asbestos was used most heavily in construction during the 1960s,[15] until such use was restricted between 1973 and 1978. Most individuals exposed to asbestos in building construction and maintenance will not begin to manifest the symptoms of asbestos disease until after the majority of those exposed during shipbuilding operations have already died.[16] There are no firm estimates of the impact of asbestos materials on the occupants of buildings containing friable materials. However, Congress was sufficiently concerned about adverse health effects to mandate the removal of all friable asbestos from school buildings.[17] According to the U. S. Department of Education, at least 14,000 schools will be affected.[18]

B

Experts do not anticipate that the death rates from asbestos related disease will begin to level off until after

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[13]*Asbestos in Buildings: A National Survey of Asbestos-Containing Friable Materials* 2-3 (Environmental Protection Agency 1984).

[14]*Id.* at 1-1.

[15]*Id.* at 7-20.

[16]Washington Post, *Asbestos' Toll*, Sept. 17, 1984, at C 1, col. 1 (quoting Dr. William Nicholson, an expert on asbestos related diseases).

[17]20 U.S.C. § 3601(a)(3)(6). *See Report of the Attorney General on Asbestos Liability*, House Comm. on Education & Labor, 97th Cong., 1st Sess. (1982).

[18]Asbestos Litig. Rep. (Andrews) 8,147 (April 20, 1984).

1990.[19] Estimates of asbestos-related deaths also vary widely. The Rand Corporation, in the *Costs of Asbestos* Litigation,[20] a study prepared by its Institute for Social Justice, has summarized the results of the more prominent studies on this issue.

Dr. Irving Selikoff, in a 1981 study for the Department of Labor estimated that more than 21 million living American workers have been significantly exposed to asbestos during the past 40 years.[21] More conservative estimates have placed the number of individuals who experienced significant exposure at between eight and eleven million[22] or at over thirteen million.[23]

Dr. Selikoff anticipates 200,000 deaths before the year 2000 because of asbestos-associated diseases.[24] Paul MacAvoy of Yale University forecasts excess mortality due to asbestos through 2015 will range between 154,600 and

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[19]Special Project, *supra* note 5, at 580.

[20]*Supra*, note 4, at 8-11.

[21]*Costs of Asbestos Litigation, supra* note 4, at 9, (citing to I. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States*, Environmental Sciences Laboratory, Mt. Sinai School of Medicine of the City University of New York (1981)).

[22]Special Project, *supra* note 5, at 580 n. 13 (citing National Cancer Institute and National Institute of Environmental Health Sciences, *Estimates of the Fraction of Cancer Incident in the United States Attributable to Occupational Factors* 1-2 (draft summary Sept. 11, 1978)).

[23]*Occupational Health Hazards Compensation Act of 1982: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 132 (1982) (statement of Mr. Harvey Martens, executive vice president, Commercial Union Insurance Companies, Inc.) (cited in Special Project, *supra* note 5, at 580 n. 13).

[24]*Costs of Asbestos Litigation, supra* note 4, at 9 (citing to Selikoff, *supra* note 22).

450,600 with the most probable estimate set at 265,000.[25] Johns-Manville anticipates only 18,700 excess mesothelioma deaths and 55,120 excess lung cancer deaths through 2009.[26] These estimates chart only asbestos-related deaths, not disabilities.

C

Not all individuals who were exposed to asbestos or even all of those who will die of asbestos-related diseases will actually bring suit. The Epidemiology Research Institute has estimated that Johns-Manville faces between 30,000 and 120,000 suits, with 45,000 set as the most probable number.[27] Paul MacAvoy has estimated that there will be over 200,000 new suits,[28] while Conning and Company has placed between 83,000 and 178,000 by the year 2010.[29] Despite substantial differences, all sources support the conclusion that asbestos producers and courts face an unprecedented number of claimants in the years to come.

As latent claims are developing over time, the likelihood that an injured party will go to court is increasing rapidly. Only 3% of the asbestos-related deaths between 1967-1968

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[25]*Id.* at 10 (citing to MacAvoy *et al.* "The Economic Consequences of Asbestos-Related Disease," Yale University School of Organization and Management, Working Paper No. 27 (January 1982)).

[26]Walker, *Projections of Asbestos-Related Disease 1980-2009, Final Report,* (Epidemiology Resources, Inc. 1982) (cited in *Costs of Asbestos Litigation, supra* note 4, at 11).

[27]*In re Johns-Manville Corp.,* 36 B. R. 743, 746 (Bkrtcy. S.D.N.Y. 1984).

[28]*Costs of Asbestos Litigation, supra* note 5, at 10, citing MacAvoy, *supra* note 20.

[29]Conning & Company, *The Potential Impact of Asbestos on the Insurance Industry* (1982) (cited in *Variations in Asbestos Litigation Compensation and Expenses, supra* note 2, at 4).

resulted in law suits, but by 1975-76, this figure had risen to 32%.[30] In estimating the numbers of future suits, experts are assuming that by 1992 all asbestos-related deaths will result in litigation.[31] When this increasing propensity to sue is combined with mounting numbers of injured parties the burden on both producers and courts stemming from the asbestos litigation becomes staggering.

II. The Costs

A

The most comprehensive studies of past costs are the two Rand Corporation reports referred to throughout this Appendix.[32] These studies calculate that the defendant asbestos companies and their insurers paid claimants and their lawyers approximately $400 million between 1970 and 1982. This figure encompasses trial awards, including punitive damages, and settlements.[33] In appraising the economic impact of this figure, the reader must be aware that in recent years jury verdicts have been demonstrating a pronounced upward trend.[34] Moreover, this does not include legal fees or litigation expense incurred by the producers themselves.

The average plaintiffs' verdict after a trial was $388,000.[35] The importance of limiting claims to those diseases actually diagnosed is demonstrated by these average jury

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[30] *Costs of Asbestos Litigation, supra,* note 4, at 9.

[31] *Id.* at 10 n. 14.

[32] *Variation in Asbestos Costs and Litigation, supra,* note 2; *Costs of Asbestos Litigation, supra* note 4.

[33] *Costs in Asbestos Litigation, supra* note 4, at 17.

[34] N. Y. Times, January 10, 1983, D-2, col. 1 (cited in *In re Johns-Manville,* 36 B. R. at 746).

[35] *Variations in Asbestos Litigation Compensation and Expenses, supra* note 2, at 21.

verdicts: asbestosis—$205,000, lung cancer—$311,000, and mesothelioma—$469,000.[36]

The Asbestos Litigation Reporter determined that of the 147 asbestos cases tried a total of $39,468,002 in punitive damages had been awarded to 21 plaintiffs.[37] The Rand Study also addressed the issues of punitive damages. During the sample period chosen, January 1, 1980 to August 26, 1982, nineteen plaintiffs, 27% of those whose trials resulted in a jury verdict, received a total of $4,934,-000 in punitive damages. The awards, which ranged from $4,000 to $1 million, averaged $260,000 per plaintiff receiving punitive damages. If this amount was apportioned between all plaintiffs with jury verdicts, the net effect would be to raise each plaintiff's average compensation by $70,000.[38] These awards are not only becoming more numerous but also larger. By 1983, the number of punitive awards had risen to thirty.[39] Ten such awards, averaging $616,000, have now been returned against Manville alone.[40] The multiplication of these awards is demonstrated by a recent case in the Eastern District of Texas where a jury returned a punitive damage award of $1 million to each of the four plaintiffs.[41] This one verdict almost equals the awards given over the entire period studied by Rand.

The Rand study also demonstrated how a state with liberal laws governing punitive damages effectively can gain a disproportionate share of assets through these awards. Citizens of Pennsylvania, whose laws encourage

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[36]*Id.* at 30.

[37]Special Project, *supra,* note 5, at 707 n. 853 (citing Asbestos Litig. Rep. (Andrews) 5663-71 (Oct. 8, 1982)).

[38]*Id.* at 50.

[39]Brownstein, *Asbestos Litigation: A Legal Nightmare That Congress is Being Asked to End,* 15 Nat'l J. 1942, 1946 (1983).

[40]*In re Johns-Manville,* 36 B. R. at 746.

[41]Asbestos Litig. Rep. 9,169 (Andrews) (Nov. 2, 1984).

punitive awards,[42] received two-thirds of the almost $5 million awarded during the eighteen month period studied.[43] While only 14% of the plaintiffs nationwide whose trials began in the relevant period received punitive awards,[44] 34% of the Pennsylvania plaintiffs in this group were given punitive damages.[45]

B

The ultimate punitive liability which confronts the asbestos companies cannot be predicted reliably. Many studies have estimated the total liability confronting the industries and its insurers. Their estimates vary as widely as those attempting to predict the number of future deaths or law suits. The Rand study describes the results of three such studies. Paul MacAvoy anticipates a future compensation liability between $8 billion and $87 billion, with $38 billion as the most likely sum.[46] Conning and Company has placed future liability for the insurance industry arising from asbestos exposure within the range of $4 billion to $10 billion.[47] Manville Corporation, in its Chapter 11 proceedings, has estimated its own future liability at a minimum of $2 billion,[48] but the presiding bankruptcy judge has observed that there are many indications that this figure is too conservative.[49] The New York Academy of Science

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[42]Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation,* 87 Dick. L. Rev. 265, 280-83 (1983).

[43]*Variations in Asbestos Litigation Compensation and Expenses, supra* note 2, at 71.

[44]*Id.* at 50.

[45]*Id.* at 71.

[46]*Costs of Asbestos Litigation, supra* note 5, at 10.

[47]*Id.*

[48]*In re Johns-Manville,* 36 B. R. at 746.

has estimated the social costs of the death and disability resulting from asbestos exposure at between $39 billion and $74 billion over the next 25 years.[50]

It is unclear whether figures encompass liability arising from the use of asbestos in buildings. At present, removal of this material is mandatory only in schools. A recent study by the U. S. Department of Education estimates this involves some 14,000 schools and that removal costs will reach $1.4 billion.[51] At least forty school districts have filed suit against the asbestos companies to obtain compensation for the removal of the asbestos. Many of these suits are also seeking millions of dollars in punitive awards.[52]

III. The Defendants

This liability confronts a relatively small group of asbestos companies and their insurers. On the average, twenty defendants are named in each suit. Although more than three hundred different corporations have been sued, liability is actually focused on a very small group. Sixteen corporations are named in at least half of all the suits. Another group of fifteen are in one-quarter to one-half of the suits.[53] Accordingly, the bulk of the 300 defendants play a minimal role in the overall amount of litigation.

Most asbestos producers claim to be covered by insurance for part or all of their exposure. About fifty insurers have some involvement, but only about twelve can be characterized as deeply involved in this controversy.[54] The likely number of asbestos claims ultimately covered by

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[49] *Id.*

[50] Special Project, *supra* note 4, at 581 n. 21.

[51] Asbestos Litig. Rep. (Andrews) 8,147 (April 20, 1984).

[52] Asbestos Litig. Rep. (Andrews) 9,253 (Nov. 16, 1984).

[53] *Costs of Asbestos Litigation, supra* note 4, at 12.

[54] *Id.*

insurance is uncertain in light of the widespread ongoing litigation over the coverage provided by the policies in question.[55]

No available assessment totals the combined assets of the asbestos defendants and their insurance companies. However, the Commercial Union Insurance Company, in their amicus curiae brief supporting a petition for certiorari in *Insurance Company of North America* v. *Keene Corp.*, has estimated that the net worth of the insurance companies involved to be $9.7 billion and that of the asbestos companies as $25.6 billion, for a combined total of $35.3 billion.[56] This is less than most of the liability estimates described in Part II B. Manville, the largest of the producers has an estimated net worth of only $1 billion dollars.[57]

IV. The Courts

Asbestos-related litigation is proceeding in at least forty-eight states. The largest proportion of the cases filed to date is found in those states where the shipbuilding industry is centered. On a national basis, slightly more than half of the claims closed by August of 1982 were filed in federal court. In two of the five states generating the most litigation, New Jersey and Texas, over 90% of the closed claims were brought in federal court, while in California and Pennsylvania, also within that group, over two-thirds of the closed claims were filed in state courts. All federal courts together have tried about 10% more suits than state courts.[58] According to the Administrative Office

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[55]*See* Special Project, *supra* note 4, at 709-73.

[56]Asbestos Litig. Rep. (Andrews) 4364, 4367-69 (Jan. 8, 1982).

[57]Afelli, *Management by Bankruptcy,* Fortune 69, 69 (Oct. 31, 1983).

[58]*Costs of Asbestos Litigation, supra* note 4, at 10.

of the Courts, as of June 30, 1980 the asbestos cases were divided among the district courts in each circuit as follows:[59]

5th Circuit—39%
1st Circuit—24%
2d Circuit—8%
4th Circuit—8%
3d Circuit—7%
6th Circuit—4%
9th Circuit—3%
11th Circuit—3%
7th Circuit—2%

Less than 1% of the cases are pending within the 8th, 10th, and D.C. Circuits.

V. An Industry Response

The asbestos producers and their insurance companies, under the guidance of Dean Wellington of Yale Law School recently have agreed to establish an Asbestos Claims Facility designed to settle claims arising from asbestos injuries. The Facility, would be a national institution to evaluate the existence and extent of asbestos-related physical impairment for each claimant. It would also assess the liability of those companies belonging to the Facility, and consider any applicable defenses and setoffs. The terms of the agreement establishing the Facility also provide for the member insurance companies to reimburse the asbestos companies for claims paid according to a prescribed formula.[60]

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[59]Letter from David Cook of the Administrative Office of the United States Courts to Judge Charles Clark (Sept. 4, 1984).

[60]*Asbestos Claims Facility Goes Public: Wellington Negotiations Succeed in Round One,* 2 Alternatives to the High Cost of Litigation 2-5 (1984).

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 82-4288

JAMES LEROY JACKSON - - - *Plaintiff-Appellee*

v.

JOHNS-MANVILLE SALES CORPORATION and
Raybestos-Manhattan, Inc. - *Defendants-Appellants*

March 23, 1984

Opinion on Granting of Rehearing En Banc
July 2, 1984.

Former shipyard worker brought strict liability against asbestos manufacturers and sellers of asbestos products allegedly used in shipbuilding at shipyard in which he worked, seeking recovery for injuries allegedly caused by defendants' failures to warn of hazards of exposure to asbestos products. After eight of the defendants had settled before trial and one had been granted summary judgment, the United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., Chief Judge, entered judgment in favor of worker, and remaining defendants appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) worker was entitled to strict tort liability cause of action against manufacturers; (2) evidence of probability that worker would contract cancer following contraction of asbestosis was improperly admitted; (3) punitive damages were inappropriate; (4) three letters extracted from papers of former president and

chairman of board of one of manufacturers were improperly admitted into evidence; and (5) trial court did not err in refusing to inform jury of settlement amounts.

Affirmed in part, reversed in part, and remanded.

1. Products Liability Key 15

Under Mississippi law of strict liability in tort, a manufacturer's liability is not without limits, but rather rests on concept of "duty," which grows out of contemplated or normally intended use of its defective product and extends at least to those persons within area of that use who can reasonably be foreseen to be endangered.

2. Products Liability Key 96

Trial court correctly instructed jury as to asbestos manufacturer's duty under Mississippi law in former shipyard worker's strict liability action in tort by charging jury that such duty extended to those persons whom manufacturer should reasonably foresee would likely use its products or who are likely to come into contact with the danger, if any, inherent in the use of its product or products.

3. Products Liability Key 8, 11

Under Mississippi law, defect that makes a product "unreasonably dangerous" for strict tort liability purposes may be a design defect, a manufacturing defect, or a marketing defect.

See publication Words and Phrases for other judicial constructions and definitions.

4. Products Liability Key 14

Under Mississippi law, with respect to products that are unavoidably unsafe, manufacturer is under a duty to provide adequate warning of those dangers that are reasonably foreseeable.

5. Products Liability Key 14

Under Mississippi law, if product is distributed without adequate warnings, then even if benefits of product outweigh risks, unreasonably dangerous product remains so, and manufacturer is strictly liable to those who are foreseeably endangered.

6. Products Liability Key 87

Under Mississippi law, whether warning of those dangers from use of a product that are reasonably foreseeable is adequate as to a particular plaintiff in form, content, or dissemination is a matter of fact, not law.

7. Products Liability Key 14

Under Mississippi law, when a warning with respect to use of a product is required, its absence is per se an inadequate warning.

8. Products Liability Key 62

Under Mississippi law, failure to give foreseeable user of asbestos products any warning rendered asbestos products unreasonably dangerous.

9. Damages Key 166(2)

In former shipyard worker's action against sellers and manufacturers of asbestos, trial court erred, under Mississippi law, in not excluding evidence about relationship between asbestos exposure and cancer since worker, who had contracted asbestosis, did not prove that he presently suffered from cancer.

10. Products Liability Key 17

Under Mississippi law, actionable delict in strict liability for physical injury is generation of disease in plaintiff's body, and not initial exposure of plaintiff to potentially

hazardous substances or some more abstract invasion of plaintiff's legally protectable interests.

11. Products Liability Key 62

Under Mississippi law, a cause of action for the physically separate and distinct disease of cancer cannot be created from cause of action for asbestosis injuries actually sustained by proof that if asbestos fibers have caused asbestos, some exposure probably will result in cancer at a later time.

12. Products Liability Key 81

In view of fact that, under Mississippi law, former shipyard worker's recovery for asbestosis disability was limit of his present right of action, evidence about probability of developing cancer was not relevant to establishing any element of liability of asbestos manufacturers and sellers with respect to their failures to warn of specific risks upon which cause of action was predicated.

13. Evidence Key 146

Although evidence of increased probability of contracting cancer following contraction of asbestosis might be relevant to discrete issue of former shipyard worker's claim for compensation for future medical examinations that would be required to determine if any cancer had appeared, trial court nevertheless erred, under Mississippi law, in not excluding evidence of cancer in view of substantial danger that asbestos manufacturers and sellers being sued by worker would be unfairly prejudiced by proof that a dread disease was a probable result of worker's exposure to asbestos dust. Fed. Rules Evid. 403, 28 U.S.C.A.

14. Judgment Key 724

Generally, in a second suit on a differnt cause of action, parties are estopped from relitigating only those issues actually and unnecessarily decided in first suit.

15. Negligence Key 121.5

Under Mississippi law, plaintiff's burden in a tort action is to show that defendant was proximate, or a contributing, cause of injury.

16. Products Liability Key 83

Under Mississippi law, evidence as to causation in fact was sufficient in former shipyard worker's strict liability action against asbestos manufacturers to recover for injuries allegedly caused by their failure to warn of hazards of exposure to their asbestos products.

17. Damages Key 91(1)

Under Mississippi law, punitive damages were inappropriate in asbestos litigation.

18. Damages Key 91(1)

Punitive damages under Mississippi law requires a showing of wanton, gross, or intentionally wrongful conduct.

19. Damages Key 87(1)

Under Mississippi law, punitive damages are granted in the nature of punishment for the wrongdoing of the defendant and as an example so that others may be deterred from the commission of similar offenses, thereby in theory protecting the public.

20. Damages Key 87(1)

Punitive damages are not favored under Mississippi law.

21. Damages Key 91(1)

Under Mississippi law, punitive damages should be allowed only with caution and within narrow limits.

22. Damages Key 91(1)

In determining whether punitive damages should be allowed under Mississippi law in strict liability cause of action filed in connection with former shipyard worker's asbestos injury, it is necessary to evaluate wisdom of imposing pecuniary punishment in class of cases consisting of suits filed as result of asbestos-related injuries and advisability of using punitive damages as a deterrent to future conduct, as well as nature of conduct involved.

23. Damages Key 87(1)

Excessive punitive damages are antithetical to general objectives of retribution and reformation.

24. Evidence Key 145, 146
Federal Courts Key 896
Products Liability Key 81

In former shipyard worker's strict liability action against asbestos manufacturers, trial court committed reversible error in admitting three letters extracted from papers of former president of one of manufacturers, two of which constituted interchange between manufacturer's president and manufacturer's attorney in 1935 questioning desirability of publishing in newly created magazine dealing with asbestos articles on British and American research on asbestosis and comparability of British and American asbestos situations, since any probative value was substantially outweighed by danger of confusing issues and misleading jury to unfair prejudice of manufacturers. Fed. Rules Evid. Rule 403, 28 U.S.C.A.

25. Products Liability Key 14

For purposes of determining foreseeability requirement in strict liability for failure to warn, manufacturer is held to knowledge and skill of expert in field.

26. Evidence Key 219(3)

In former shipyard worker's strict liability action against asbestos manufacturers, trial court did not err in refusing manufacturers' request to make full disclosure to jury of amounts of settlements reached between worker and other defendants.

Megehee, Brown, Williams & Mestayer, Roy C. Williams, Pascagoula, Miss., Lively M. Wilson, Dorothy J. Chambers, Louisville, Ky., William N. Reed, John H. Holloman, III, Jackson, Miss., for defendants-appellants.

Richard F. Pate, Mobile, Ala., Cupit & Maxey, Danny E. Cupit, Jackson, Miss., Blatt & Fales, Ronald L. Motley, Barnwell, S. C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, GARZA, and JOLLY, Circuit Judges.

CLARK, Chief Judge:

Johns-Manville Sales Corporation (Johns-Manville) and Raybestos-Manhattan, Inc. appeal a jury verdict awarding actual and punitive damages to James Jackson, a former shipyard worker, in a strict liability action for injuries allegedly caused by the defendants' failure to warn of the hazards of exposure to their asbestos products. Finding that the trial court ruled correctly on Jackson's entitlement to a strict liability cause of action but erred in admitting evidence of the mere possibility of Jackson's developing cancer and in allowing punitive damages in this strict lia-

bility action, we affirm in part, reverse in part, and remand for a new trial.

I. FACTS AND PROCEDURAL BACKGROUND

James Jackson began working at Ingalls Shipbuilding Corporation (Ingalls) in Pascagoula, Mississippi, in 1953, when he was about twenty-seven years old. He worked there until 1971, first as a sheet-metal mechanic and after 1957 as a work leaderman or supervisor. Jackson testified that he was exposed to asbestos dust every day for the full time of his employment at Ingalls.

As a mechanic, he installed sheet metal over ducts, shelves, pipes, boilers, and other such surfaces within ships under construction. Often these surfaces previously had been covered with asbestos insulation. To attach sheet metal, Jackson had to drill holes in the asbestos insulation. He testified that he also cut and dovetailed gaskets from asbestos material. Occasionally, he would cut asbestos cloth, three or four feet wide, with his pocket knife or shears in order to wrap and protect equipment around which he was working. He alleged that all these activities generated asbestos dust in the air.

Jackson testified that he worked alongside other craftsmen who made more direct and extensive use of asbestos products. He testified, for instance, that in lagging boilers, he worked alongside insulators who would first saw and tear blocks of asbestos, then rivet the asbestos to the boilers, all of which made the air "very dusty." He testified that when he worked in engine rooms, asbestos dust would fall upon him as insulator workmen above him on catwalks or temporary scaffolds cut and installed asbestos. Jackson testified that other workers generated asbestos dust in his work area when they dumped sacks of asbestos powder into mortar boxes and mixed the powder with water to create cement, or "mud." Workers also raised dust

around him as they cut asbestos cloth to wrap pipes and other surfaces, and as they sawed prefabricated wall boards containing asbestos.

Jackson alleges that after he became a supervisor, he had to move about the entire ship where these various activities were taking place. He also would go back to his duties as a mechanic when his supervisory duties were not pressing.

Jackson testified that asbestos dust in his work environment at Ingalls "was very thick. It would even go down your collar, it would get in your ears, and get in your hair and be white all over your clothes . . . . It would look like snow sometimes . . . . Sometimes it would be so thick you couldn't see twenty or thirty feet."

In 1978, Jackson first consulted his family physician about breathing problems. He was diagnosed as having asbestosis. His treating physician, Dr. McAtee, estimated Jackson's pulmonary disability to be about 15 per cent at the time of the initial diagnosis but did not recommend that he discontinue working. Evidence introduced at trial indicated that Jackson's physiological impairment has not progressed significantly since the time of the original diagnosis.

Jackson alleges that his asbestos-related disability has sapped his energy and stamina, made him susceptible to increased risks of infections and malignancies, impaired his ability to work, caused him mental frustration, necessitated the worry and expense of ongoing medical checkups, and reduced his life expectancy.

Before commencing work at Ingalls, Jackson held jobs with the Corps of Engineers and the Army. He also worked as an auto mechanic and in various other capacities. He testified that to the best of his knowledge these other jobs had never exposed him to asbestos, sandblasting, or toxic fumes. After quitting his job at Ingalls, Jackson

worked for a natural gas company, first as a meter reader and at the time of this trial as a warehouseman.

Surveys of studies analyzing health hazards posed by excessive exposure to asbestos are readily available elsewhere.[1] We briefly sketch the more prominent developments in the ongoing scientific inquiry which are particularly pertinent to this case. Research projects dating from the 1920's, financed in part by Johns-Manville, indicated that exposure to excessive concentrations of asbestos dust over prolonged periods of time could produce asbestosis in asbestos workers.[2] A 1947 report of the American Conference of Governmental Industrial Hygienists recommended, in light of the hazards posed, threshold limit values for exposure to asbestos of five million parts per cubic foot of air.[3]

In 1944, the first extensive study of the effects of asbestos on shipyard workers concluded that, because the researchers found few cases of asbestosis among the Navy shipyard workers studied, "asbestos covering of naval

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[1]For more thorough surveys of studies of the risks associated with asbestos, see *Borel* v. *Fibreboard Paper Products Corp.*, 493 F. 2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419 U. S. 869, 95 S. Ct. 127, 42 L. Ed. 2d 107 (1974); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vanderbilt L. Rev. 573, 596-605 (1983).

[2]Johns-Manville financed research by the Metropolitan Life Insurance Company, reported in The Effects of the Inhalation of Asbestos Dust on the Lungs of Asbestos Workers — Preliminary Study, 50 Public Health 1 (1935).

[3]*See* Documentation of the Threshold Limit Values for Substances in Workroom Air, A.C.G.I.H. (3d ed. 1971). In 1968, the Conference recommended the threshold limit value should be reduced to two million parts per cubic foot.

vessels is a relatively safe operation."[4] This report indicated, however, that most of its research subjects had been exposed to asbestos for fewer than ten years and cautioned that longer exposure would have resulted in a considerably greater incidence of asbestosis.

A 1965 study by I. J. Selikoff[5] concluded that the 1944 study was misleading. Finding evidence of asbestosis in about half the insulation workers examined, and in over 90% of the workers with over forty years experience, the Selikoff report indicated that asbestosis and related complications were "significant hazards among insulation workers" and indicated that previous threshold limit values were set too high. Other reports have confirmed these findings. *See Borel* v. *Fibreboard Paper Products Corp.*, 493 F. 2d 1076, 1085 (5th Cir. 1973), *cert. denied*, 419 U. S. 869, 95 S. Ct. 127, 42 L. Ed. 2d 107 (1974); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vanderbilt L. Rev. 573, 601 (1983).

In response to a preliminary report of Dr. Selikoff's study, Johns-Manville in 1964 began placing warning labels on packages of its asbestos products.[6] Raybestos-Manhat-

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[4]Fleisher, Viles, Gade & Drinker, A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels, 28 J. Indus. Hygiene Toxicology 9 (1945).

[5]Selikoff, Churg, and Hammond, The Occurrence of Asbestos Among Industrial Insulation Workers, 132 Ann. New York Acad. Sc. 139 (1965).

[6]In 1964, the Johns-Manville warning label read:
Caution, this product contains asbestos fibers. Inhalation of asbestos in excessive quantities over long periods of time may be harmful. If dust is created when this product is handled, avoid breathing the dust. If adequate ventilation control is not possible, wear respirators approved by the United States Bureau of Mines for pneumoconiosis-product dusts.

tan first attached warning labels to its asbestos cloth in 1972.

Jackson testified that in the nineteen years he worked at Ingalls Shipyard, he was never warned that asbestos could be harmful to his health. He also testified that he could recall having seen no asbestos packaging and hence no warning labels. He alleges that the defendants knew in the 1930s of the hazards of exposure to asbestos, yet worked in concert to keep this information secret, actively avoiding research that might confirm the relationship of asbestos to cancer.

On November 21, 1978, Jackson, along with other parties, filed a class action in diversity against numerous manufacturers and sellers of asbestos products allegedly used in shipbuilding at Ingalls. After the district court denied class certification, Jackson filed an amended and supplemental complaint against twelve defendants.[7] Eight of these defendants settled before trial. One was granted summary judgment.[8] The remaining defendants were: Johns-Manville Sales Corp.; H. K. Porter Company, Inc.; and Raybestos-Manhattan, Inc.

Jackson originally based his cause of action on theories of negligence, breach of warranty, strict liability, and conspiracy to suppress facts about the risks of exposure to

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[7]Jackson's amended and supplemental complaint named as defendants: Armstrong Cork Company; Acands, Inc.; American Mutual Corporation; Combustion Engineering, Inc.; Flintkote Corporation; Johns-Manville Sales Corporation; Keene Corporation; Owens-Corning Fiberglass Corporation; Owens-Illinois, Inc.; H. K. Porter Company, Inc.; Raybestos-Manhattan, Inc.; and Standard Asbestos Manufacturing & Insulation Company.

[8]American Mutual Corporation, one of Ingalls' insurers, was granted summary judgment on the ground that it had no duty to perform any loss prevention services with respect to asbestos hazards occurring during Jackson's employment.

asbestos. In accordance with a pretrial order, Jackson abandoned all causes of action except for strict liability in tort.

The jury found that Johns-Manville and Raybestos-Manhattan were strictly liable to Jackson and assessed actual damages of $391,500. The jury also assessed punitive damages of $500,000 against Johns-Manville and of $125,000 against Raybestos-Manhattan. The jury found that H. K. Porter Co. was not liable. Jackson does not appeal the verdict in H. K. Porter Co.'s favor.

II. STRICT LIABILITY IN TORT

A. *Scope of Protection*

The defendants argue that Jackson has no cause of action in strict liability in tort, because he was not actually a "user or consumer" of their asbestos products. In this diversity case, Mississippi substantive law applies. *See Erie Railroad* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

In the seminal case of *State Stove Manufacturing Co.* v. *Hodges,* 189 So. 2d 113, 118 (Miss. 1966), *cert. denied, Yates* v. *Hodges,* 386 U. S. 912, 87 S. Ct. 860, 17 L. Ed. 2d 784 (1967), Mississippi adopted § 402A of The Restatement (Second) of Torts (1965), "insofar as it applies to a manufacturer of a product." Section 402A provides, in part: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property . . . ."[9] By

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[9]Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property

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way of caveat, the authors expressed no opinion as to whether § 402A should apply to persons other than "users or consumers."

The comments to § 402A indicate that the terms "users or consumers" were not meant to be interpreted in a fastidiously literal or technical fashion. "Consumers" include those who prepare the product for consumption: "the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule . . . ." Comment *(1)*, § 402A. "Users" include those "passively enjoying the benefit of the product" as well as those performing work upon it, as in the case of an employee repairing an automobile. *Id.*

Writing in 1965, the drafters noted that courts "thus far" had not extended strict liability protection beyond these rather flexible classifications of "users and consumers." The Institute expressed neither approval or disapproval of expanding the rule to encompass "casual bystanders" or "casual strangers." Comment *(o)*, § 402A.

Soon after § 402A was published, several decisions expanded the rule to allow recovery for bystanders. In *Elmore* v. *American Motors Corp.*, 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P. 2d 84 (1969), Justice Peters found it consistent

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is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

with the public policy of consumer protection and with economic theories of loss distribution to allow recovery for all foreseeable harm caused by defective products. Dean Prosser reports that this decision "is by now the rule of a slight majority of the courts. Its effect is obviously to put the strict liability on the same footing as negligence, as to all foreseeable injuries." Prosser, Law of Torts, § 100 at 663 (4th ed. 1971).[10]

The defendants argue that the Mississippi approach to bystander protection is contrary to this modern trend. We disagree. It seems clear that Mississippi, while not explicitly adopting "bystander" and "user" as normative terminology, has in fact developed an approach to the problem of defining the reach of § 402A that is consistent with the modern trend of allowing recovery for foreseeable injuries.

In adopting § 402A, the *State Stove* court stated the requirements for strict liability in these terms: "the manufacturer is liable strictly in tort only if (a) he puts on the market a product which is not reasonably safe, and (b) the plaintiff is injured as a result of the contemplated use of it." 189 So. 2d at 121. This formulation of strict liability made two noteworthy adjustments to the terms of § 402A. First, it abandoned the "user or consumer" terminology. Second, it added a requirement of "contemplated" use, hinting at foreseeability as a constraining factor on the class of plaintiffs protected under the rule. A review of

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[10]*See generally* King & Nevelle, The Bystander's Right Under Strict Liability Does Exist: A Call for Reform of the Restatement, 25 St. Louis U. L. J. 543 (1981); Noel, Defective Products: Extension of Strict Liability to Bystanders, 38 Tenn. L. Rev. 1 (1970); Comment, Strict Products Liability to the Bystander: A Study in Common Law Determination, 38 U. Chi. L. Rev. 625 (1971).

the court's subsequent decisions on strict liability suggests that these adjustments were purposeful.

Three years after *State Stove,* the Mississippi court made explicit what it had previously hinted at in adding the requirement concerning "contemplated" use.

> The strict liability rule for products liability cases adopted by this Court eliminates the necessity to show negligence in the manufacture of the product where it is shown that the product left the hands of the manufacturer in a defective condition, but this rule does not eliminate the requirement that, even where there is a defect in the product, that *there must be some duty owed to the plaintiff with regard to the defect, growing out of the intended normal use for which the product was manufactured.*

Walton v. *Chrysler Motor Corp.,* 229 So. 2d 568, 573 (Miss. 1969) (emphasis added). In *Walton,* the plaintiff's automobile was struck from behind. The impact snapped a screw in the back rest, and the seat collapsed. The plaintiff was flung backward and then forward against the steering column. The court held that the manufacturer was not strictly liable for the plaintiff's injuries, because the "intended normal use" of the automobile did not give rise to a duty on the manufacturer's part to guard against a defect that did not cause or contribute to the cause of the accident.

Walton has been roundly criticized, both for reaching a questionable result and for injecting a negligence concept of duty into the doctrine of strict tort liability.[11] The defendants argue that *Walton* manifests the Mississippi

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[11] *See* Maraist and Barksdale, Mississippi Products Liability-A Critical Analysis, 43 Miss. L. J. 139, 180 n. 200 (1972). The authors queried whether *Walton* might not spell doom for strict liability in Mississippi. Those fears have proved misplaced.

court's unwillingness to extend strict liability protection to "bystanders." We disagree. *Walton's* holding is not premised upon any classification of the injured driver as a "bystander" or "user." Instead, it invokes directly a standard of duty analysis to determine strict liability.

Walton's fact context makes it clear that the court was concerned more with the source of the manufacturer's duty than with the class of persons to whom any duty would extend. But the two concerns are interrelated. If the manufacturer's duty to the plaintiff grows out of the contemplated or intended normal use of the product, then the plaintiff's entitlement to protection depends upon that contemplated or intended normal use. The scope of that duty appears to be defined by foreseeability as it relates to intended use.

A series of cases in which the Mississippi court has extended strict liability protection to parties that might be considered remote users or even bystanders bolsters this view and discredits the argument that Mississippi would restrict § 402A protection to a rigidly literal class of "users and consumers." In *Ford Motor Co.* v. *Cockrell,* 211 So. 2d 833 (Miss. 1968), a city employee noticed smoke rising from the motor of an unattended city truck. As he was about to lift the hood, the starter engaged and caused the truck to lurch forward and strike him. The court allowed recovery against the truck's manufacturer on a theory of strict liability in tort. The court did not discuss the "bystander/user" issue, but instead quoted, as it had in *State Stove,* Dean Prosser's commentary on *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050 (1916), a negligence case: "The conclusion is clear that the duty extends to any one who may reasonably be expected to be in the vicinity of the chattel's probable use, and to be endangered if it is defective." 211 So. 2d at 836, *quoting State Stove,* 189 So.

2d at 115-16, *quoting* Prosser, Law of Torts 661-63 (3d ed. 1964).

In *Falstaff Brewing Corp.* v. *Williams*, 234 So. 2d 620 (Miss. 1970), a cafe employee was told to move some bottles of beer. As she reached into the cooler, an untouched bottle exploded, injuring her hand. The court allowed recovery on a theory of strict liability in tort without specifically addressing the "user/bystander" issue. Similarly, the court, in *Fruehauf Corp.* v. *Trustees of First United Methodist Church*, 387 So. 2d 106 (Miss. 1980), avoided that issue while allowing recovery in strict liability for property damage. In that case, oil spewed into a church sanctuary when the nozzle on a dump trailer hydraulic line ruptured as the trailer was being operated across the street from the church. Although not addressing explicitly the issue of duty in either decision, the court in both *Fruehauf* and *Falstaff* quoted from *Escola* v. *Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P. 2d 436, 440-41 (1944), in which Justice Traynor observed that even in the absence of negligence, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[12]

The defendants cite *Oliver* v. *City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974) as demonstrating Mississippi's restrictive approach to strict liability. In that case, the court refused "to change the existing rule [of caveat emptor] and to apply instead the products liability rule," *id.* at 467, holding that, as a matter of policy, real estate should not be subject to the same rules of strict liability as manu-

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[12]Maraist & Barksdale, *id.* at 184, noted that *Falstaff* could arguably be interpreted as implicitly embracing liability without fault. The same could be said of *Fruehauf*.

factured goods.[13] For similar policy reasons, the Mississippi court declined to impose on retail merchants "the absolute duty of inspecting for latent defects every article of wearing apparel . . . that the retailer might offer for sale." *Sam Shainberg Co.* v. *Barlow*, 258 So. 2d 242, 246 (Miss. 1972). Mississippi's refusal to recognize strict liability causes of action in situations that present special policy concerns does not purport to restrict the scope of § 402A in causes of action that the court has found advance public policy. Strict liability actions against the manufacturers of defective products consistently have been put in the latter category.

In sum, except in limited circumstances where special public policy considerations indicate strict liability causes of action are not appropriate, the Mississippi court has demonstrated a willingness to afford broad consumer protection.

[1] The Mississippi court has made it clear that manufacturers' liability is not without limits. The court has repeatedly disclaimed any intention of treating manufacturers as insurers for all harm caused by their products. *See General Motors Corp.* v. *Howard*, 244 So. 2d 726, 728 (Miss. 1971); *Ford Motor Co.* v. *Simpson*, 233 So. 2d 797, 798 (Miss. 1970); *Walton* v. *Chrysler Motor Corp.*, 229 So. 2d at 570; *State Stove Manufacturing Co.* v. *Hodges*, 189 So. 2d at 120. The Mississippi court has also injected into its strict liability principles the negligence concept of "duty." Though it has been variously expressed and intimated, it seems to be summarized thus: The manufacturer's duty grows out of the contemplated or normally intended use of its defective product and extends at least to

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[13] *Oliver* also indicated that an implied warranty would not run between parties in the absence of privity of contract. This aspect of the case was reversed in *Keyes* v. *Guy Bailey Homes*, 439 So. 2d 670 (Miss. 1983).

those persons within the area of that use who can reasonably be foreseen to be endangered.

[2] The trial court's instruction as to the manufacturer's duty in a § 402A cause of action under Mississippi law was proper. The jury was told that the duty extended "to those persons whom it should reasonably foresee would likely use such products or who are likely to come into contact with the danger, if any, inherent in the use of its product or products."[14] The defendants complain that this in-

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[14]The trial court instructed the jury on the issue of the defendant's duty to Jackson:

> The manufacture[r] of a product has a non-delegable duty to give an adequate warning of any dangers inherent in the use of its product or products to those persons whom it should reasonably foresee would likely use such products or who are likely to come into contact with the danger, if any, inherent in their use. That is, anyone whom it could reasonably foresee would likely be exposed to the danger, if any, during the use of its product, by any danger, if any, inherent in its use.
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> * * * * * * * *
>
> There is no dispute that James Jackson was not an actual user of the asbestos products manufactured by these defendants. His alleged exposure occurred while he was working in the vicinity where these products were being installed aboard ships. The legal duties imposed upon manufacturers as stated by me herein, extend to anyone who may be reasonably expected or foreseen to be in the vicinity of the product's probable use and be endangered thereby, if any.
>
> This duty to warn comes into play if, but only if, a manufacturer either actually knows or has reason to know or believe that its product is likely to be unreasonably dangerous for its intended use in the manner in which it is anticipated or foreseen or reasonably foreseen, that is, that it would be used, and that the alleged dangers or defects are not actually known to the user or others coming into contact therewith, or that they are not so open and obvious that they should be known by the

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struction allowed the jury to decide the legal question of whether § 402A protection extends to bystanders. The complaint is without merit. The court correctly interpreted Mississippi law, which bases the scope of § 402A on the manufacturer's legal duty with attendant factual considerations of foreseeability.

B. *Failure to Warn*

[3] The defect that makes a product "unreasonably dangerous" for strict tort liability purposes may be a design defect, a manufacturing defect, or a marketing defect. Special Project, 36 Vand. L. Rev. at 589. *See Carter* v. *Massey-Ferguson, Inc.*, 716 F. 2d 344, 346 n. 1 (5th Cir. 1983); *Edwards* v. *Sears, Roebuck & Co.*, 512 F. 2d 276, 288 (5th Cir. 1975). Jackson alleges that the defendants' failures to give him adequate warnings or directions constituted marketing defects that rendered the defendants' asbestos products unreasonably dangerous.

In *Migues* v. *Fibreboard Corp.*, 662 F. 2d 1182, 1188 n. 11 (5th Cir. 1982) (citations omitted), we stated:

> According to the Restatement, Section 402A, comment j, a seller has a duty to warn consumers or users of his product of known or knowable dangers attendant upon its use. A product may be "unavoidably unsafe," according to the Restatement, Section 402A, comment k, when it is incapable of being made safe for its "ordinary and intended use." Such a product may nevertheless be marketed if it provides important benefits, but the seller of such a product is responsible for informing consumers or users of the risk of harm. More-

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users, or others coming into contact therewith while they are being used, through the exercise of ordinary and reasonable care, and based upon their own experience.

> over, manufacturers are "held to the knowledge and skill of an expert" in products liability cases. Manufacturers must therefore at least keep themselves informed of scientific discoveries concerning their products. Finally, a manufacturer's duty to warn extends to the ultimate user of his product, and his warnings must be given in such a way as to reach that user.

If the seller gives warning, he "may reasonably assume that it will be read and heeded . . . ." Comment j, § 402A.

The defendants argue that it is mere fantasy to suppose that bystanders or others "outside the marketing scheme" would ever receive a warning that merely accompanied the product. Rather, "the manufacturer would be required to resort to some form of public communication, such as television, radio or newspaper." Such advertising would not, they argue, be entitled to the Restatement's "presumption of efficacy." The defendants argue that under Mississippi law, the burden upon the manufacturer of undertaking such a warning campaign must be balanced against the possible benefits obtainable from such an undertaking. The defendants conclude that, as a matter of law, this balancing test would weigh in the manufacturer's favor with respect to persons in Jackson's position and that these products would thus not be unreasonably dangerous. We disagree.

This argument is partially mooted by our determination that the manufacturers' duty in strict liability did in fact extend to Jackson. Moreover, we find no precedent to indicate that Mississippi would hold that the duty to warn of dangers inherent in a product may be lessened by the difficulty of communicating that warning to those foreseeably in need of it.

The primary strict tort liability case upon which the defendants rely, *Pridgett* v. *Jackson Iron & Metal Co.*, 253 So. 2d 837 (Miss. 1971), held that the seller of used products

breached no duty to warn its vendee's employee where the vendee had in fact warned the employee and where the evidence showed that the product was in fact reasonably safe for its intended use. To the extent that *Pridgett* pertains at all to the case at bar, it undercuts the defendants' argument by suggesting that, in appropriate circumstances, the duty to warn a vendee's employees may be discharged quite simply through the vendee.

[4-7] Nor do we find that defendants' suggested balancing test is compatible with the Restatement theory of strict tort liability. With respect to products that are unavoidably unsafe, the manufacturer is under a duty to provide adequate warning of these dangers that are reasonably foreseeable. *Borel,* 493 F. 2d at 1088. If the product is distributed without adequate warnings, then even if the benefits of the product outweigh the risks, an unreasonably dangerous product remains so, and the manufacturer is strictly liable to those who are foreseeably endangered. Whether the warning is adequate as to a particular plaintiff in form, content, or dissemination is a matter of fact, not law. When a warning is required its absence is *per se* an inadequate warning.

[8] The defendants do not argue that the jury lacked sufficient evidence to find their products unavoidably unsafe. Those products were distributed without any warning and hence were unreasonably dangerous. The issue of whether ability to warn a bystander could affect the adequacy of a warning actually made is not a viable issue in this case.

III. ONE CAUSE OF ACTION OR TWO

During the course of the trial, Jackson called several expert witnesses who testified at length about the role that exposure to asbestos fibers plays in the etiology of lung cancer, mesothelioma, and other malignancies. Three of

these expert witnesses testified that, based upon statistical risks adduced from epidemiological studies and upon examinations of portions of Jackson's medical record, they believed that Jackson had a greater than fifty percent chance of contracting an asbestos-related cancer in the future.[15]

The defendants argue that this evidence about the relationship between asbestos exposure and cancer was irrelevant, because the proof showed that Jackson had only a mild case of asbestosis, resulting in a fifteen percent disability. They argue that the trial court committed reversible error in failing to exclude the testimony concerning the potential for later development of cancer, which alarmed the jury and unfairly prejudiced the defendants.

[9] We hold as a matter of substantive law that the present state of the record limits Jackson's right to recover damages to any disability resulting from asbestosis. Therefore, the court erred in not excluding the evidence about cancer since Jackson did not prove that he presently suffers from that disease.

In arguing that the cancer evidence was properly admissible, Jackson relies on the general rule of tort law that allows for recovery of all harms — past, present, and prospective — legally caused by a tort. "[W]here it is established that future consequences from an injury to a person will ensue, recovery may be had, but such future consequences must be established in terms of reasonable probabilities." *Entex, Inc.* v. *Rasberry*, 355 So. 2d 1102, 1104 (Miss. 1978). *See Garrett* v. *Wade*, 259 So. 2d 476 (Miss. 1972). *See also Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d 111, 119 (D.C. Cir. 1982). This is the traditional

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[15]The only one of Jackson's expert witnesses actually to examine him was the local treating physician, Dr. McAtee, who testified that, in his opinion, Jackson would not contract cancer.

"all or nothing" approach, whereby the plaintiff becomes entitled to full compensation for those prospective damages that are proved to be "probable" (a greater than 50 percent chance), but is not entitled to any compensation if the proof does not establish a greater than 50 percent chance.[16] Jackson argues that the expert testimony was relevant in establishing the requisite probability of future harm from cancer.[17]

It is evident, however, that the all-or-nothing rule is predicated on an assumption that a cause of action has accrued with respect to the prospective harm for which recovery is sought.[18] The real question is whether, when Jackson's cause of action accrued for asbestosis injuries, a cause of action accrued simultaneously for cancer injuries, even though Jackson had not developed cancer at the time of trial.

The proof discloses that asbestosis and cancer are distinct diseases. Asbestosis is a fibrosis or scarring of the lungs resulting from inhalation of asbestos fibers. It is not a cancerous process. It is not always fatal, but can cause progressive deterioration of the pulmonary function and lung volume. There is a direct relation between cumulative exposure levels to asbestos and development of the disease. Cigarette smoking is not a contributing factor.

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[16]*See Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d 111, 119 (D.C. Cir. 1982); Restatement (Second) of Torts § 910, comment a; King, Causation, Variation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L. J. 1353, 1371-72 (1981); Note, Damage Contingent Upon Chance, 18 Rutgers L. Rev. 875, 876 (1964).

[17]We dismiss out of hand the defendants' incredible argument that statistics do not prove probability.

[18]Comment a, Section 910 of the Restatement (Second) of Torts, states: "[a]ssuming . . . that a cause of action has arisen at the time when the action is brought . . ., the injured person is entitled to recover damages" for prospective harms.

Generally, asbestosis has a latency period of ten to twenty-five or more years, from time of initial exposure until manifestation of the disease.[19]

Mesothelioma is a rare form of malignancy which occurs in the thin membrane, or epithelium, that lines the surfaces of the lungs and of the abdominal cavity. Jackson's expert testified that as little as a week's exposure to asbestos could trigger the disease. The best available evidence does not indicate that cigarette smoking contributes to the development of the disease. The latency period may be from twenty to forty years or more. The disease is invariably fatal.[20]

The development of asbestos-related lung cancer (pulmonary and bronchogenic carcinoma) occurs mainly in the lower lobes of the lungs and is correlated with the degree of exposure to asbestos fibers. Cigarette smoking greatly enhances the risks. The latency period is fifteen to thirty-five years.[21]

Evidence introduced at trial indicates that asbestos is linked, to a lesser degree, with other types of malignancies. It can cause benign, non-disabling conditions, such as asbestos corns and callouses on the hands of workers who handle raw asbestos. Asbestos inhalation has also been linked to heart disease. It can also cause thickening (plaque) or calcification of the membrane (pleura) covering the outer surface of each lung.

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[19]For a discussion of asbestosis, see *Borel* v. *Fibreboard Paper Products Corp.*, 493 F. 2d at 1083; J. Selikoff & D. Lee, Asbestos and Disease 143-56 (1978); Special Project, 36 Vand. L. Rev. at 579 n. 10.

[20]*See Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d at 113; J. Selikoff & D. Lee, Asbestos and Disease 241-44, 262-66; Special Project, 36 Vand. L. Rev. at 579 n. 11.

[21]*See* J. Selikoff & D. Lee, Asbestos and Disease 307-21, 26-27; Special Project, 36 Vand. L. Rev. at 579 n. 12.

Jackson does not claim that he has cancer. He has produced no evidence that asbestosis will inevitably lead to cancer. The proof adduced does not demonstrate any relation between the pathologies of asbestosis and cancer, except that the diseases can be precipitated by the same pathogen or carcinogen. Viewed from this perspective, Jackson's claim for asbestosis injuries adds nothing to his claim for cancer damages. Had he attempted to recover for cancer damages before he had manifested any disease at all, his evidentiary burden of establishing his entitlement to compensation for future cancer would be no different from that in the present posture of this case. It would not be carried by proof that he was exposed to asbestos fibers and that, statistically, he was at over 50% risk of contracting cancer.

Causality as an operation of physical events which may culminate in future harm must be distinguished from causality as an operation of law which may culminate in a claim for future harm. In the context of a latent disease case, causality poses a novel question whether the accrual of a claim based on the manifestation of one disease results in the simultaneous accrual of claims based on "probable" future manifestations of physically separate diseases. The ultimate question is how abstractly to characterize the wrong that underlies the cause of action.

We find no precedent that squarely addresses the issue before us. However, courts addressing the limitation of action issue in latent disease cases frequently have addressed many of the relevant considerations. They can inform our decision.

A few courts have adopted a limitations rule that measures the accrual of a cause of action from the time the

offending substance invades the body.[22] These courts employ the rule that would obtain in a traditional trauma case, reasoning that the injury is the initial harmful contact and not the maturation of disease. *See* Note, Preserving Causes of Action in Latent Disease Cases: The *Locke* v. *Johns-Manville Corp.* Date-of-the-Injury Accrual Rule, 68 Va. L. Rev. 615, 620-22 (1982).

A majority of courts,[23] however, have adopted a rule of discovery, under which "the cause of action does not accrue until the injury is discovered or in the exercise of reasonable diligence should have been discovered." *Borel,* 493 F. 2d at 1102 (construing Texas law). *See* Special Project, 36 Vand. L. Rev. at 642-47.

In *Urie* v. *Thompson,* 337 U. S. 163, 69 S. Ct. 1918, 93 L. Ed. 1282 (1949), the Supreme Court applied the discovery rule in determining, for limitations purposes under the Federal Employers' Liability Act, the time of accrual of a railroad fireman's claim for damages resulting from his contraction of silicosis, many years after his initial exposure to silica dust. The Supreme Court noted that a "mechanical analysis" of the accrual of the plaintiff's cause of action, attempting to measure the disease from some specific moment of contact with silica dust, would afford the plaintiff only a

> delusive remedy. . . . It would mean that at some past moment in time, unknown and inherently unknow-

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[22]*See, e.g., Steinhardt* v. *Johns-Manville Sales Corp.,* 54 N.Y. 2d 1008, 430 N.E. 2d 1297, 446 N.Y.S. 2d 244 (1981); *Garrett* v. *Raytheon Co.,* 368 So. 2d 516, 521 (Ala. 1979); *Peterson* v. *Roloff,* 57 Wis. 2d 1, 203 N.W. 2d 699 (1973).

[23]*See, e.g., Wilson* v. *Hartzman,* 373 So. 2d 204 (La. App.), *cert. denied,* 376 So. 2d 961 (La. 1979); *Hughes* v. *Eureka Flint & Spar Co.,* 20 N.J. Misc. 314, 26 A. 2d 567 (1939); *Tennessee Eastman Corp.* v. *Newman,* 22 Tenn. App. 270, 121 S. W. 2d 130 (1938); *Plazak* v. *Allegheny Steel Co.,* 324 Pa. 422, 188 A. 130 (1936).

> able even in retrospect, [the plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs; under this view [the plaintiff's] failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.
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> * * * * * * *
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> It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.

Id. 69 S. Ct. at 1025, *quoting Associated Indemnity Corp.* v. *Industrial Accident Commission,* 124 Cal. App. 378, 381, 12 P. 2d 1075, 1076 (1932).

Although the Mississippi court has not specifically addressed the time of accrual of a strict liability cause of action in a latent disease case, it is clear that Mississippi would apply the discovery rule. The Mississippi court has held, in *Ford Motor Co.* v. *Broadway,* 374 So. 2d 207, 209 (Miss. 1979), that the limitations period for strict products liability actions is governed by Section 15-1-49 of the Mississippi Code Ann. (1972), which provides: "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." The court observed:

> The statute of limitations in strict products liability cases should strike a balance between the necessity of providing the consumer with adequate time within which to discover a defect and institute an action, and

> the need to provide the manufacturer with a definite period of liability and a date on which his exposure to suit ends . . . . [W]e hold that . . . the statute begins to run from the time that injuries are sustained.

Ford Motor Co. v. *Broadway*, 374 So. 2d at 209.

[10] The court's recognition of the plaintiff's need to have adequate time in which to vindicate his rights commands the view that the Mississippi court would follow the judicial trend in adopting the discovery rule for strict liability latent disease cases, rather than put upon the plaintiff the uneasy burden of instituting a claim for injuries unknown and unknowable as of the time of initial exposure to the potential pathogen. In this context, the "sustained" injury must be equated with the physical manifestation of disease. The corollary is that the actionable delict in strict liability for physical injury is the generation of disease in the plaintiff's body, and not the initial exposure of the plaintiff to potentially hazardous substances or some more abstract invasion of the plaintiff's legally protectible interests.

The question remains, however, whether, upon the manifestation of one disease, a cause of action accrues for all prospective diseases, so that the plaintiff has the right (and in a limitations context, the duty) to seek recovery for physically distinct and separate diseases that may or may not develop in the future. The courts that have considered this issue in the limitations context have said no.

In *Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d 111 (D.C. Cir. 1982), the court determined that a diagnosis of "mild asbestosis" in 1973 did not start the limitations period running for the separate and distinct disease of mesothelioma, first manifested in 1978. The court noted that there was a tension between the underlying evidentiary and repose considerations. The court observed that al-

though it would best serve the defendant's interests in repose to have all contingent claims accrue simultaneously, the evidentiary concerns of "the existence of the [prospective] disease, its proximate cause, and the resultant damage" are better served by allowing the evidence to develop over time. *Id.* at 119. The court then determined that the plaintiff's interest in receiving adequate compensation and the defendant's interest in paying no more than that were best served by recognizing discrete causes of action for discrete injuries. *Id.* Finally, the court held that considerations of judicial economy weighed in favor of recognizing separate causes of action, lest the plaintiff be compelled to rush to court upon the first manifestation of an injury not in itself worthy of litigation, rather than risk losing all claims for future serious injuries. *Id.* at 120. *Accord, Pierce* v. *Johns-Manville Sales Corp.*, 296 Md. 656, 464 A. 2d 1020 (1983).

In *Goodman* v. *Mead Johnson & Co.*, 534 F. 2d 566 (3d Cir. 1976), in a cause of action against a manufacturer of contraceptive drugs, the court held that, for limitations purposes, the plaintiff's cause of action for cancer did not accrue simultaneously with the manifestation of thrombophlebitus years earlier. The court based its decision on a causation analysis, reasoning that the two diseases were not products of the same "chain of causality." Rather, the manufacturers had exposed the plaintiff to two distinct risks, incurred distinct duties to test and warn, and hence was subject to two distinct causes of action. *Id.* at 574.

In *Martinez-Ferrer* v. *Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980), a California court recognized separate causes of action for limitations purposes created by the independent and non-simultaneous injuries of dermatitis and cataracts, though both resulted from the plaintiff's taking an anti-cholesterol drug. The court observed:

> If the manufacturer of such a drug is liable for the long-delayed effects of his product, it advances no coherent public policy to absolve him of that liability simply because right after the ingestion of the drug the user suffered other, different, independent and relatively innocuous side effects for which he did not bother to sue.

Id. 164 Cal. Rptr. at 595. The court concluded that the otherwise useful rule of law against claim splitting should not be applied where it would lead to injustice. *Id.* 164 Cal. Rptr. at 596.

The issue before us is not, of course, whether Jackson's claim has expired by the operation of the limitations period. The question is whether a cause of action has arisen for injuries other than asbestosis. As they relate to the analysis of the underlying theory of causation, however, the two issues involve identical values. Furthermore, the policy considerations that inform the divisibility of claims for purposes of measuring limitations periods and applying principles of res judicata are the same policy considerations that drive the determination of when separate causes of action arise.

As applied in limitations cases, the discovery rule operates under the assumption that the plaintiff sustains no actionable injury when the pathogen enters the body. "[T]he injurious consequences are the product of a period of time . . . ." *Urie* v. *Thompson*, 69 S. Ct. at 1025. The completion of the incubation period and manifestation of the disease create the causation of actual injury and the accrual of the cause of action. When the plaintiff develops asbestosis, the causation condition is fulfilled for that injury. Causation is complete and the defendant is liable for all damages — past, present, and future — that the proof shows will probably develop as a consequence of the as-

bestosis injury. Until and unless the plaintiff develops cancer, however, the causation of cancer has not occurred. The plaintiff is denied recovery for prospective damages associated with cancer not because the evidence of future consequences is insufficiently reliable, but because, as a matter of substantive law, there can be no consequence until there is effect, and no effect without completed cause.

[11] Plaintiff cannot create a cause of action for the physically separate and distinct disease of cancer from the cause of action for asbestosis injuries actually sustained by proof that if asbestosis fibers have caused asbestosis, the same exposure probably will result in cancer at a later time. To permit this assumption of causation to control liability would cause massive dislocations in the rights of parties. The proof shows that asbestos fibers may cause asbestosis. It also shows that asbestos fibers may cause cancer. But it does not show that asbestosis may cause cancer. Logic and justice require that presently latent injuries must await their separate maturity as a cause of action. A doctrinaire application of the reasonable certainty rule would result in a mismatching of entitlement, liability, and compensation. "Persons who contract the first, but not the second, disease will receive a windfall and, in the aggregate, the defendant will overcompensate the injured class." *Wilson* v. *Johns-Manville Sales Corp.*, 684 F. 2d at 120 n. 45. This problem is especially acute where the proof of greater-than-50% probability derives from statistical data that would support prospective recovery universally for a class that, according to the same proof, would suffer much less than universal disability.

To permit "recovery" for harms not yet effected would contravene Mississippi's clear policy against treating manufacturers as insurers of their products. Whatever benefit lies in allowing some plaintiffs present compensation for speculative future injury must be balanced against the

need for maintaining viable enterprises that can accomplish the risk distribution purpose of strict liability for those persons who are caused injury by a defendant's product. *See Ward* v. *Hobart Manufacturing Co.*, 450 F. 2d 1176, 1189 (5th Cir. 1971) (construing Mississippi law).

The detriment to defendants of allowing claims for uneffected future harms is manifest. A plaintiff who suffered the injury of asbestos callouses on his hands, for instance, plausibly could institute an action, based on expert testimony of statistical probability, to recover not only for callouses but for future injuries that ran the gamut from asbestosis to mesothelioma to lung cancer. The defendants' interests in repose pale against the interests of equitable exposure to liability.

On the other hand, the plaintiff suffers little if any detriment by being required to await manifestation of a condition before having a claim for damages resulting from that class of conditions. The quality of the plaintiff's evidence of cancer injury is likely to improve with the passage of time. Indeed, the plaintiff has a better chance of securing fair compensation for his injuries when the injury has actually manifested itself and medical certainty can replace speculation.

Our holding that the causes of action must be divided for purposes of seeking recovery for future harm requires that they also be discrete for limitations purposes. It would disadvantage a plaintiff unfairly and disserve judicial economy to measure the limitations periods for future diseases from the time of manifestation of a separate and distinct disease.

Because the claims for separate injuries are divisible, the plaintiff would not be barred from bringing a subsequent suit based on claims for separate and distinct injuries within the applicable limitation period following the materialization of the later disease. *Cf. Everett Plywood*

Corp. v. *United States*, 512 F. 2d 1082, 1087 (Ct. Cl. 1975) (separate action founded on single indivisible contract may be brought later if it was incapable of being asserted when earlier suit was commenced). Commanded by the recognition of separate causes of action, this result also is consistent with recognized exceptions to the rule against claim splitting. Section 26 of the Restatement (Second) of Judgments provides that the general rule against claim splitting is rendered inapplicable where:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or
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> * * * * * * *
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> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. . . .

This court has recognized that "[p]rinciples of res judicata are not ironclad," but must be applied to accomplish justice in the light of public policy. *Bogard* v. *Cook*, 586 F. 2d 399, 408 (5th Cir. 1978), *cert. denied*, 444 U. S. 883, 100 S. Ct. 173, 62 L. Ed. 2d 113 (1979). *See also Dore* v. *Kleppe*, 522 F. 2d 1369, 1374 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F. 2d 103, 109 (5th Cir. 1975); *Bennett* v. *Commissioner of Internal Revenue*, 113 F. 2d 837, 839 (5th Cir. 1940) ("res judicata is a principle of peace"). In this case, justice requires that the cause of action for cancer stand upon its own base.

[12] Jackson argues that evidence of the relationship between asbestos use and cancer is relevant to issues apart for the extent of prospective injuries to his health. He argues that the evidence is relevant to establishing elements of the defendants' liability, specifically whether the defendants had notice of foreseeable hazards, whether warnings were adequate or necessary, and whether the de-

fendants met their duty to test their products. Because Jackson's recovery for asbestosis disability is the limit of his present right of action, however, the evidence about cancer is not relevant to establishing any element of the defendants' liability with respect to their failures to warn of the specific risks upon which Jackson's cause of action is predicated.

[13] Jackson also argues that cancer evidence is relevant to his claim for compensation for future medical examinations that will be required to determine if any cancer has appeared. Although the cancer evidence may be relevant to this discreet issue in establishing the types and costs of future medical examinations, such evidence must be weighed by the trial court in the light of our opinion here under Rule 403 of the Federal Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

There is substantial danger that the defendants would be unfairly prejudiced by proof that a dread disease is a probable result of plaintiff's exposure. The jury also may be confused about the limits of Jackson's present rights of action if the cancer evidence is put before them now. Jackson can readily establish the reasonable necessity and expense of future medical examinations by other means of proof, including, for any reasonable defendant, a stipulation. The weight of these values is for the trial court in the first instance. On the record before us now, we conclude that the trial court erred in not excluding the evidence of cancer since proof of the existence of the disease was not made.

If, at any time in the future, Jackson claims that he has contracted cancer and that asbestos fibers caused that disease, he has a new cause of action, with new damages. His right to commence that action arises at the time he knows or in the exercise of reasonable diligence should have discovered that he has contracted the disease. The statute of limitations commences to run from the same time.

[14] We do not address the questions of res judicata or collateral estoppel that might arise later, because we cannot predict what findings the court and jury will make when this case is retried. We note generally that in a second suit on a different cause of action, "the parties are estopped from relitigating only those issues actually and necessarily decided in the first suit." *Dore* v. *Kleppe,* 522 F. 2d 1369, 1374 (5th Cir. 1975). *See also Castillo* v. *Railroad Retirement Board,* 725 F. 2d 1012, at 1014 (5th Cir. 1984); *Stevenson* v. *International Paper Co.,* 516 F. 2d 103, 109 (5th Cir. 1975).

IV. MENTAL ILLNESS

The trial court denied the defendants' request that the jury be instructed that, as a matter of law, it could not consider Jackson's alleged mental anguish for his purported increased risk of cancer. The trial court instead charged the jury that Jackson was entitled to compensation for "[a]ll physical pain and mental anguish suffered by him to date and such as he is reasonably certain to suffer in the future as a direct result of his complained of condition."[24]

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[24]The trial court instructed further on this issue:

> In this regard also, you may consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from the injury. If you find from a preponderance of the evidence there was such an aggravation,

(Footnote Continued on Next Page)

Our holding here makes a ruling on defendants' objection unnecessary.

Jackson argues that this instruction failed to authorize any recovery for fear or risk of cancer, because "there was, of course, at no point any claim that the 'complained of condition' of Mr. Jackson was cancer." Jackson made no objection to the trial court's refusal expressly to authorize recovery for fear of risk of cancer. Since our holding here bars the proof allowed in the first trial on the issue of damages for potential cancer, we leave to the trial court's initial exercise of discretion whether evidence of Jackson's fear of the risk of cancer should be admitted on retrial

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(Footnote Continued From Preceding Page)

you should determine, if you can, what portion or part of plaintiff's condition — or condition complained of, that is, resulted from the aggravation and make alowance in your verdict only for that aggravation. Under the law a wrong-doer takes a person as he finds him, with all of his pre-existing disabilities and infirmities of body, and if you find for the plaintiff against any or all of the defendants in this case then each such defendant against whom you find from a liability standpoint, is liable for any and all aggravation of any pre-existing injury or condition of the plaintiff proximately caused by its conduct, if any, and in which event the plaintiff would be entitled to recover reasonable damages to fairly compensate him for such aggravation of his pre-existing condition, if any.

Now, with respect to the measure of damages and the degree of proof required, the law does not prescribe any measure by which damages for physical pain and suffering and mental anguish can be determined, but leaves it to your sole discretion to fix such amount and such sums as may be deemed just and proper, under all the circumstances. The law does not require the plaintiff to prove his damages for pain and suffering and mental anguish in dollars and cents; all the law requires is that he prove the extent of his injuries, and then it is for you the jury to determine the amount of damages, if any, which should be awarded to him for past and future physical pain and suffering and mental anguish.

under Fed. R. Evid. 403 and whether such a claim is permitted by the pleadings. While all values are not identical, many of the same considerations discussed with regard to future medical examinations are relevant.

V. PROXIMATE CAUSATION

For the guidance of the district court on retrial we now hold that the quantum of evidence Jackson adduced in the original trial was sufficient to raise a jury issue as to causation in fact.

It is undisputed that Jackson suffers from asbestosis and that asbestos fibers caused the disease. Jackson is unable, however, to prove with certainty that on a specific day in a specific compartment of a specific ship he came in contact with the defendants' products. Rather, he relies on circumstantial evidence which shows that Raybestos-Manhattan products were ordered for use on at least seven to ten of the approximately sixty-nine hulls on which he worked during his career. Johns-Manville products were ordered for use on thirty or more of the hulls. Some of Jackson's former co-workers testified that they recalled working with Johns-Manville and Raybestos-Manhattan products in very dusty conditions.

[15] Under Mississippi substantive law, the plaintiff's burden is to show that the defendant "shall have been the proximate, or a contributing, cause of injury to another; and in order that it shall be a proximate or contributing cause it must have been a substantial factor in producing the injury." *New Orleans & N.E.R. Co.* v. *Burge,* 191 Miss. 303, 2 So. 2d 825, 826 (1941).

[16] Federal law provides the standard for determining the sufficiency of the evidence. *Fairley* v. *American Hoist & Derrick Co.,* 640 F. 2d 679, 681 (5th Cir. 1981). Under that standard, we do not find that the facts and inferences point so strongly and overwhelmingly in favor of one party

that reasonable men could not arrive at the conclusion that the products of these defendants were substantial factors in producing Jackson's injuries. *See Borel,* 493 F. 2d at 1094; *Boeing Co.* v. *Shipman,* 411 F. 2d 365, 375 (5th Cir. 1969) (en banc).

The jury had sufficient evidence to find that the defendants' failures to warn proximately caused Jackson's injuries. If warnings are given, a presumption arises that they will be read and heeded. Restatement (Second) of Torts § 402A, comment j. In the absence of any warning, the burden shifts to the defendant to show that the plaintiff would have sustained his injuries even if warnings had been given. *See New Orleans & N.E.R. Co.* v. *Burge,* 2 So. 2d at 827.[25] The defendants made no such showing.

Raybestos-Manhattan argues that it and H. K. Porter Co. were in legally and factually indistinguishable positions with regard to their distributions of asbestos cloth to the shipyard, except that H. K. Porter Co. supplied asbestos cloth on many more of the vessels on which Jackson worked. Nevertheless, the jury absolved H. K. Porter Co. while holding Raybestos-Manhattan liable. Raybestos-Manhattan argues that the jury could have reached this result only on the basis of a chain of untenable inferences.

We addressed a similar issue in *Borel,* 493 F. 2d at 1094:

> This inconsistency in the jury's verdicts, although puzzling, need not detain us. It has long been the rule

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[25]Other states have recognized the presumption that an adequite warning would be heeded. *See, e.g., Borel,* 493 F. 2d at 1093, (construing Texas law); *Wolfe V. Ford Motor Co.,* 6 Mass. App. 346, 376 N. E. 2d 143, 147 (1978); *Rawlings Sporting Goods Co.* v. *Daniels,* 619 S. W. 2d 435, 439 (Tex. Civ. App. 1981); *Menard* v. *Newhall,* 135 Vt. 53, 373 A. 2d 505, 506 (1977); Sales, The Duty to Warn and Instruct for Safe Use in Strict Tort Liability, 13 St. Mary's L. J. 521, 549 (1982).

that consistency in general verdicts is not required. *Dunn* v. *United States*, 1932, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356. "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty . . . is immaterial. Juries may indulge in precisely such moti s or vagaries." *United States* v. *Dotterweich*, 1943, 320 U. S. 277, 279, 64 S. Ct. 134, 135, 88 L. Ed. 48. Thus, even if the general verdicts are internally inconsistent, such is the jury's perogative if, as we have found, there is evidence to support the finding reached by the jury.

VI. PUNITIVE DAMAGES

Special problems attend awards of punitive damages in the myriad actions which have arisen from the catastrophic nation-wide exposure of workers to asbestos. The scope of this mass litigation is without precedent and practically without dimension. A recent independent study for the U. S. Department of Labor estimates that "there are presently more than 21 million American workers . . . who, in the past forty years, were significantly exposed to asbestos." Selikoff, Report to the U. S. Department of Labor, Disability Compensation for Asbestos-Associated Disease in the United States 4 (1982), *reported in Seltzer,* Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 37 n. 1 (1983). The study projected over 200,000 deaths from asbestos-related cancers by the end of the century. *Id.* That number does not include deaths from asbestosis. *Id.*

It has been reported that over 20,000 personal injury lawsuits have been filed in connection with workers' asbestos injuries. *Congress Grapples with Toxic Torts,* Nat'l L.J., Jan. 31, 1983, at 30, col. 1, *reported in* Seltzer,

52 Fordham L. Rev. at 37 n. 1. Johns-Manville states on brief that currently over 14,000 cases are pending against it in the United States, seeking over fifty billion dollars in damages, far beyond its financial resources. It reports that over 9,300 of those suits seek punitive damages and that over three million dollars in punitive damages already have been awarded. *See* Seltzer, 52 Fordham L. Rev. 37, 39 n. 11 (itemizing punitive damages awarded in previous cases). Raybestos-Manhattan states that as of May 1, 1982, it was a defendant in 11,071 suits involving 14,007 plaintiffs. It reports it has been assessed punitive damages of $500,000, in addition to those assessed in the instant verdict. Of the hundreds of these cases pending in the federal courts in Mississippi, this is the first to come before us on appeal.

Even assuming that the scope of the problem were overstated by defendants or that many of the cases currently pending against the defendants eventually would be settled, the defendants still would face an open-ended and overwhelming liability. Independent studies establish that if currently latent injuries become manifest among those workers who have been exposed to asbestos at the rates projected, the results could be catastrophic. The defendants argue that repeated assessments of punitive damages in the actions already filed threaten to exhaust their resources, making them unable to satisfy future compensatory or punitive awards.[26]

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[26]It has been noted that the risk posed by unrestrained awards of punitive damages are not confined to a single industry. "Large assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future stability of American industry." Owens, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 6 (1983). *See also* Seltzer,

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The grave reality of the need to maintain viable enterprises to meet future compensation liabilities to already injured persons and those with latent diseases commands consideration of the whole picture rather than a myopic, mechanical analysis that would look to this cause of action alone and deny that there exist tens of thousands of others, and the potential for many times more.

Writing in *Roginsky* v. *Richardson-Merrell,* 378 F. 2d 832, 839, 841 (2d Cir. 1967), Judge Friendly observed that:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill . . . . [A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.

Roginsky involved an anti-cholesterol drug, MER/29, which had been found to cause adverse effects, primarily cataracts, in some consumers. The drug was distributed for about two years before being withdrawn from the market in 1962. When *Roginsky* was decided in 1967, there

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Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 37-40 (1983).

were currently "several hundred" other cases pending against the manufacturer.[27]

Judge Friendly noted that the MER/29 actions bore little resemblance to those types of actions for which punitive damages had historically been awarded, where victims were few in number and the prospects for litigation clearly confined. *See id.* at 838-39. Asbestos actions bear little resemblance either to the traditional punitive award situation or to the MER/29 situation. In asbestos litigation, we are concerned with exposures that occurred over decades. The victims are not limited to those who used or consumed the product directly. The potential injuries are more severe and more diverse. The latency period is far longer. Far more cases are pending, and the prospects for future litigation are almost limitless.

Roginsky was tried upon theories of negligence and fraud, not strict liability. Judge Friendly decided that the applicable New York case law afforded him no basis to disallow punitive damages in these causes of action in the MER/29 situation. *Id.* at 846.

[17] Mississippi substantive law would disallow punitive damages in the instant strict liability litigation. In the extraordinary circumstances in which this litigation is set, the allowance of punitive damages is incompatible with the objectives of and would disrupt the viability of the strict liability cause of action. Moreover, the basic policy objectives of punitive damages are satisfied in this instance by defendant's multiple exposure to compensatory damages. Therefore, punitive damages are inappropriate in these extraordinary circumstances.

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[27]For a discussion of the mass tort litigation involving MER/29, see Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 51-55 (1983).

Strict liability in Mississippi is founded on the dual policy objectives of accomplishing economic loss distributions and promoting consumer safety. "The purpose of [strict tort liability] is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *State Stove Manufacturing Co.* v. *Hodges,* 189 So. 2d at 120, *quoting Greenman* v. *Yuba Power Products, Inc.,* 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897 (1962). *See also* The Restatement (Second) of Torts § 402A, comment (c). This policy seeks not merely to assure compensation for the individual plaintiff, but to achieve the broader societal objective of equitable loss distribution.

Essential to the maintenance of effective loss distribution in strict liability is the presence of viable enterprises that can absorb the losses and compensate victims for their injuries. If the enterprise should fail, early victims would receive compensation but others whose latency periods were longer would receive no compensation at all. At the point where awards of punitive damages destroy the viability of the enterprises necessary to accomplish loss distribution, the remedy of punitive damages becomes incompatible with the strict liability cause of action. The later victims, not the enterprise, effectively bear the punishment. In the mass catastrophe now maturing from pervasive asbestos exposure, the allowance of punitive damages could destroy the marginally viable system of loss distribution in strict liability.

[18, 19] Punitive damages under Mississippi law require a showing of wanton, gross, or intentionally wrongful conduct. *Hart* v. *Walker,* 720 F. 2d 1436, 1442 (5th Cir. 1983) (construing Mississippi law); *State Farm Mutual Auto Insurance Co.* v. *Roberts,* 379 So. 2d 321 (Miss. 1980). Punitive damages are granted "in the nature of punishment

for the wrongdoing of the defendant and as an example so that others may be deterred from the commission of similar offenses thereby in theory protecting the public." *Snowden* v. *Osborne*, 269 So. 2d 858, 860 (Miss. 1972).

[20-22] Because such damages are assessed as a punishment and as an example to others, they are not favored in law. *Lee* v. *Southern Home Sites Corp.*, 429 F. 2d 290, 294 (5th Cir. 1970) (construing Mississippi law). *See also Ratner* v. *Sioux Natural Gas Corp.*, 719 F. 2d 801, 805 (5th Cir. 1983) (construing Texas law). Punitive damages "should be allowed only with caution and within narrow limits." *Consolidated American Life Insurance Co.* v. *Toche*, 410 So. 2d 1303, 1304-05 (Miss. 1982); *Standard Life Insurance Co. of Indiana* v. *Veal*, 354 So. 2d 239, 247 (Miss. 1977). In determining whether punitive damages should be allowed in this case it is necessary to evaluate the wisdom of imposing pecuniary punishment in this class of cases and the advisability of using punitive damages as a deterrent to future conduct, as well as the nature of the conduct involved. *See Gore* v. *Turner*, 563 F. 2d 159, 164 (5th Cir. 1977) (construing Mississippi law); *Lee* v. *Southern Home Sites Corp.*, 429 F. 2d 290 at 294.

[23] In authorizing the imposition of punishment, courts seek only to effectuate the general objectives of retribution and reformation. Excessive punishment is antithetical to these objectives. *See Ratner* v. *Sioux National Gas Corp.*, 719 F. 2d at 805. Qualitatively, punitive damages are not incompatible with the concept of liability without fault. Both seek to compensate or reward the victim who brings the offending enterprise to book, but under separate standards and separate concepts for separate purposes. A problem arises when the limits of future strict liability compensation cannot be forecast, as they cannot be in today's asbestos litigation. Then awards of compensation without regard to fault and punitive damage

awards lose their homogeneity. Punitive damages should increase the victim's reward if conscious wrong accompanies the distribution of an offending product. However, in the virtually limitless damage milieu of asbestos litigation, punitive damages carry such a portent of overkill as to threaten future claimants rather than the enterprise with the burden of punishment awards to early victims. The general societal objectives of punishment—retribution and reformation—are adequately met in such a situation by the prospects of open-ended strict liability compensation that are as overwhelming as they are in this litigation.

The anticipation of multiple litigation for compensation damages serves in this instance as an effective deterrent to future illicit conduct. From a market-level perspective, the risk of non-deterrence is greatest where the manufacturer thinks it feasible to hold injury compensation losses to an amount that would still allow a profit on the defective item. This risk is especially great in situations where the potential injuries are so difficult to detect or so slight in relation to the burdens of instituting litigation that many injured persons would be likely to forego compensation claims. *See Acosta* v. *Honda Motor Co.*, 717 F. 2d 828, 838 (3d Cir. 1983); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1284-85 (1976). *See also Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437, 449-50 (1980). That is not the situation with respect to manufacturers of asbestos products, which products are now known to have the potential of inflicting grave injuries on unrestricted numbers of persons. No manufacturer could engage consciously in wrongdoing that would expose it to such overwhelming strict liability with any reasonable expectation of doing so profitably. On the contrary, the prospect of exposure to massive litigation in strict liability provides the impetus for manufacturers to take affirmative steps to ensure the safety of their products, since mere

non-negligent behavior is no guarantee against strict liability.

The significance of punitive damages as a deterrent depends upon the size of the penalty increase relative to the "base penalty" exacted by strict liability compensatory awards. See F. Zimring & G. Hawkins, Deterrence 202 (1973). Because of the dimensionless character of the prospects for future litigation in this instance, the "base penalty," for all practical purposes, is illimitable. Correspondingly, the significance of punitive damages as a deterrent diminishes to the vanishing point.

Moreover, deterrence is an attenuated rationale with respect to these defendants. The defendants have long since begun to issue warnings about the safe use of their products. Johns-Manville states on brief that it ceased to manufacture the products here in issue over ten years ago.

We too "have the gravest difficulty in perceiving how claims for punitive damages can be so administered as to avoid overkill" in this situation. *Roginsky* v *Richardson-Merrel, Inc.*, 378 F. 2d at 839.

No alternatives suggested appear viable in these extraordinary circumstances. Some course and commentators suggest that overkill could be avoided by instructing the jury to consider the defendant's wealth and the probable effects of future compensatory and punitive damages awards or by other judicial control at the district court and appellate court level. *See Acosta* v. *Honda Motor Co.*, 717 F. 2d at 838-39; *Neal Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 378 (E.D. Pa. 1982); L. Frumer & M. Friedman, Products Liability § 36A.04[2][a], at p. 10A-46 (1983); Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 58-60 (1983); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1319-1325 (1976). In this case, such control would require

unearthly prescience not only about the outcome of thousands of cases now pending against the defendants, but of thousands of claims certain to arise in the future. We perceive no meaningful criteria by which we could exercise judicial control to determine what is enough and what is too much. *See Roginsky*, 378 F. 2d at 839. Likewise we perceive no criteria by which to set an arbitrary cap, either in the aggregate or for the individual suit, absent statutory guidance.

A single class action for recovery of one award of punitive damages might be an attractive alternative from a theoretical point of view, but does not appear feasible. Because the losses are so widespread and disparate, the vital legal issues would not be common to all plaintiffs, nor would the applicable legal standards be identical in all jurisdictions in which the cases would arise. *See Abed* v. *A.H. Robins Co.*, 693 F. 2d 847, 850 (9th Cir. 1982) (vacating certification of nationwide class action for punitive damages in Dalkon Shield IUD Products litigation); *Roginsky*, 378 F. 2d at 839, n. 11. *See also In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F. 2d 1175 (8th Cir.), *cert. denied*, 459 U. S. 988, 103 S. Ct. 342, 74 L. Ed. 2d 383 (1982).[28]

A final alternative, of course, would be to cling to the traditional remedy of punitive damages and let things run their course, indifferent to the disruption of the defendants' enterprises and to future claimants. One court has suggested that the demise of the manufacturer in such circumstances is not a "necessarily untenable" result. *Acosta* v. *Honda Motor Co.*, 717 F. 2d at 838 n. 15 (3d Cir. 1983). We do not share that belief. Retribution should not be effected at the expense of injured persons in need of a

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[28] *But see* Seltzer, 52 Fordham L. Rev. at 61-92, advocating a mandatory class action for punitive damages in mass tort litigation.

means of compensation for actual injuries, where retribution can be achieved effectively by ongoing liability for satisfaction of those needs.

Johns-Manville is currently in a reorganization proceeding under Chapter 11 of the Bankruptcy Code, *see In re Johns-Manville Corp.*, Nos. 82B 11,656 to 82B 11,676 (Bankr. S.D.N.Y. filed Aug. 26, 1982), alleged to be as a result of its potential tort liability arising from these suits. It might be argued that punitive damages pose no threat to the compensation of other Johns-Manville claimants, since the bankruptcy court could administratively manage punitive damage claims even to the point of denying such claims equal priority with claims for compensatory damages. *See* Note, Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System, 61 Texas L. Rev. 1297, 1322 (1983). The problem remains, however, of making provision for future claimants, whose numbers and the size of whose claims are purely speculative. Multiple present awards of punitive damages would only complicate the already formidable problems of devising a bankruptcy reorganization plan that would make adequate provision for future claimants.[29]

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[29]The bankruptcy court has ruled that the unprecedented, extraordinary nature of these proceedings mandated a declaration that future claimants are parties in interest, entitled to the appointment of an independent legal representative. The court cited a study commissioned by Johns-Manville which indicated that "a reasonable control projection of the number of lawsuits [against Johns-Manville] seen from 1982 on is likely to be about 45,000, with a reasonably firm lower bound of 30,000 and a very definitive upper bound on the order of 120,000." *In re Johns-Manville Corp.*, 36 B. R. 743, 746 (Bkrtcy. S.D.N.Y. 1984) (Decision and Order on Keene's Motion to Appoint a Legal Representative). *Cf. In re UNR Industries, Inc.*, 725 F. 2d 1111 (7th Cir. 1984) (dismissing

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With respect to defendants that have not filed for bankruptcy, the argument that bankruptcy can alleviate the problems of inequitable compensation distribution posed by punitive damage awards proves too much. It is inappropriate for the court to hold out bankruptcy as a viable resolution of the problems arising from the invocation of judge-made rules in situations alien to those situations the rules were originally intended to address.

Pioneer plaintiffs do bear a disproportionate share of litigation expense and the hazard of litigation mistakes which later plaintiffs can avoid. To the extent that punitive damage awards can alleviate these detriments, they could be justified. However, the recovery of these costs through punitive damages for early litigators will set the trend for those who follow before funds of the enterprise are exhausted. Since the basis for punitive damage recovery is not bound to bear a relation to costs involved, this second group of victims can reap a benefit at the expense of those who recover nothing later. The same inequities and

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as premature appeal of federal district court's refusal to appoint representative for future claimants in asbestos manufacturer's bankruptcy proceeding).

The bankruptcy court also ruled that Johns-Manville did not act in bad faith in filing for Chapter 11 reorganization on the basis of the crushing economic burden it will bear over the next twenty to thirty years as a result of future claims of asbestos victims. The court determined that liquidation now would preclude present asbestos victims and future claimants from receiving just compensation. *In re Johns-Manville Corp.*, 36 B. R. 727 (Bkrtcy. S.D.N.Y. 1984) (Decision and Order on Motion to Dismiss Manville's Chapter 11 Petition).

For a discussion of problems associated with devising a reorganization plan for Johns-Manville, see Special Project, 36 Vand. L. Rev. at 828-30.

the same defeated goals keep it from being a proper method of awarding costs to early litigants.

The disallowance of punitive damages in these extraordinary circumstances is not without difficulties. While societal objectives of punishment will be adequately met by multiple claims for compensatory damages, the plaintiff's individual objectives of punishment and reward go largely unsatisfied. The nature of the cause of action by which the plaintiff proceeds, however, influences the balance of societal and individual objectives of punishment. The individual objective of private retribution is outweighed by the broader societal objectives upon which the plaintiff's strict liability cause of action is predicated. The outcome of balancing policy considerations might not be the same if the plaintiff proceeded upon some other cause of action, such as negligence, predicated not on a societal objective of loss distribution but upon vindication of the plaintiff's individual legally protectible interests. That is not our case.

Some courts have questioned whether punitive damages are not inherently inconsistent with a strict liability cause of action in all circumstances, since strict liability is predicated only upon the defectiveness of the product and not upon the manufacturer's conduct. *See Gold* v. *Johns-Manville Sales Corp.*, 553 F. Supp. 482 (D.N.J. 1982) (strict liability held incompatible with punitive damages); *Butcher* v. *Robertshaw Controls Co.*, 550 F. Supp. 692, 705 (D. Md. 1981) (the two theories are incompatible); *Walbrun* v. *Berkel, Inc.*, 433 F. Supp. 384, 385 (E.D. Wis. 1976). *See also* Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 St. Mary's L. J. 351 (1983). One federal appellate court has rejected this argument, noting that strict liability is intended to "expand recovery by circumventing the restrictions imposed by fault-based standards." *Acosta* v. *Honda*

Motor Co., Ltd., 717 F. 2d 828, 835 (3d Cir. 1983) (construing Virgin Islands law). Under this view, strict liability does not preclude awards of punitive damages where the plaintiff does in fact show the requisite degree of fault. *Accord, Neal* v. *Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 378 (E.D. Pa. 1982); *Thomas* v. *American Cystoscope Makers, Inc.*, 414 F. Supp. 255, 264 n. 13 (E.D. Pa. 1976) (dictum); *Racer* v. *Utterman*, 629 S. W. 2d 387 (Mo. App. 1981); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N. W. 2d 437, 446 (1980); L. Frumer & M. Friedman, Products Liability § 36A.02[1][b], at pp. 10A-12 through 10A-19; Special Project, 36 Vand. L. Rev. at 700-01; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. at 1268-71. One appellate court has allowed punitive damages in strict liability asbestos litigation without explicitly addressing this issue. *See Moran* v. *Johns-Manville Sales Corp.*, 691 F. 2d 811, 816-17 (6th Cir. 1982) (construing Ohio law).

We do not reach the issue whether Mississippi would find punitive damages inherently incompatible with the theory of strict liability in all cases.[30] Our holding today is limited to the extraordinary circumstances of this litigation, where the allowance of punitive damages carries the manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of punitive damages are otherwise served.

We cannot predict, of course, whether other jurisdictions would subscribe to our approach in this litigation. From that perspective, our efforts to preserve the viability

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[30]In *Ashland Oil, Inc.* v. *Miller Oil Purchasing Co.*, 678 F. 2d 1293, 1318-19 (5th Cir. 1982), this court held that Mississippi would allow punitive damages in an action based on theories of strict liability, breach of warranty, negligence per se, and negligence. We did not reach the issue whether Mississippi would allow punitive damages in a pure strict liability cause of action.

of strict liability compensation may be infected with an element of futility. The alternative, however, appears to be no solution at all, but mere resignation to defeat of the purposes of both strict liability and punitive damages. A fully satisfactory solution would require properly crafted federal legislation. Since that has not come to pass, we must proceed with fundamental justice as our guide.

The disallowance of punitive damages in this situation expresses this court's central concern for the continued viability of the strict liability cause of action for present and future claimants. Where strict liability for compensatory damages imposes adequate punishment, as it does in this type of case, we decline to cleave to a judge-made remedy of punitive damages that would both fail in its own purpose and obstruct the broader objectives of the underlying cause of action which the plaintiff has chosen to pursue.

VII. ADMISSIBILITY OF "SUMNER SIMPSON PAPERS"

Sumner Simpson was president of Raybestos-Manhattan from 1929 to 1948, and chairman of the board from 1945 until his death in 1953. A number of his personal papers remained in Raybestos-Manhattan's corporate vaults until brought to light in 1974. These so-called "Sumner Simpson papers" consisted largely of letters, memoranda, surveys, and articles dating from the 1930's and 1940's.

Jackson introduced into evidence three letters extracted from these papers. The first letter, dated September 25, 1935, from an editor of the newly created *Asbestos Magazine* to Mr. Simpson, proposed the publication of articles on British and American research on asbestos. The other two letters, dated October 1, 1935, and October 3, 1935, are an interchange between Mr. Simpson and Mr. Vandiver Brown, attorney for Johns-Manville, questioning the desirability of

publishing such information and the comparability of the British and American asbestos situations. (The texts of those three letters are included as an appendix to this opinion.)

[24] The defendants argue that the trial court committed reversible error in admitting these letters, because they were relevant to no issue in the case, or if relevant, their probity was outweighed by the risk of unfair prejudice. We agree.

These letters are of no probative value as to the foreseeability of the hazards associated with the finished products with which Jackson came in contact, as foreseeability relates to the defendants' duty to provide Jackson warning. The letters do not bear upon the safety of the finished products with which Jackson first came in contact in 1953, nearly two decades after the letters were written. The research that had been done at the time these letters were written was confined to plant employees, mine workers, and textile employees. None of the research concerned workers who were involved with the end use of finished asbestos products. As regards foreseeability of hazards to plant workers, the letters are inconclusive. They evidence a concern with the comparability of British plant conditions and American plant conditions, but do not evidence directly what the hazard in American plants was perceived to be.

Even if the letters were to some degree probative of foreseeability in 1935, that evidence would be highly remote, particularly in light of the research developments that occurred before Jackson commenced employment. In 1946, the Fleisher-Drinker report,[31] the first noteworthy epidemiological study of the risks of shipyard workers exposed to asbestos products, indicated that asbestos covering of naval

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[31] *See* n. 4, *supra*.

vessels was relatively safe. This report was generally accepted until the famous Selikoff studies were published in 1965. *See* Special Project, 36 Vand. L. Rev. at 600-01. The relevant time frame in which foreseeability should be determined is that in which the products with which Jackson came into contact were distributed. The letters attempt inappropriately to fill the time gap from 1935 to 1953.

[25] We do not suggest that the Fleisher-Drinker study forecloses establishing the foreseeability of the hazards of asbestos products at the time of the study or afterwards. Foreseeability might well be established not only by other expert evidence,[32] but by proof of what the defendants themselves knew or should have known about the hazards associated with the use of their products. These particular 1935 letters are too remote in time and too attenuated in subject matter, however, to be probative in this connection.

Jackson argues that the letters are probative of the defendants' conspiracy to suppress information about the hazards of asbestos. Jackson has, however, abandoned that cause of action. Also, we have determined that Jackson is not entitled to an award of punitive damages in this case. Accordingly, the letters are not admissible to meet the requisite standard of conduct to support such an award.

Even if the letters were probative as to foreseeability, that probative value would be substantially outweighed by the danger of confusing these issues and misleading the jury, to the unfair prejudice of the defendants. *See* Fed. R. Evid. 403. There is a reasonable likelihood that a substantial right of the defendants was affected by the admission of these letters. Hence the error was not harmless.

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[32]For purposes of determining the foreseeability requirement in strict liability for failure to warn, the manufacturer is held to the knowledge and skill of an expert in the field. *Borel* v. *Fibreboard Paper Products Corp.*, 493 F. 2d at 1089.

See Johnson v. *William C. Ellis & Sons Iron Works, Inc.*, 604 F. 2d 950, 958 (5th Cir. 1979).

Johns-Manville argues that it was prejudiced unfairly by admission of numerous items of evidence apart from the letters discussed above. Johns-Manville does not attempt to identify every such item of evidence, but specifies numerous items that relate generally to establishing the defendants' knowledge of the hazards of asbestos from the 1930's until the 1960's. There is no point in ruling on this contention here. Upon retrial, this evidence, if offered, will be subject to the trial court's reconsideration of admissibility in light of our opinion today and in light of Federal Rules of Evidence 402 and 403.

VIII. DISCLOSURE TO JURY OF SETTLEMENT AMOUNTS

The jury found Johns-Manville and Raybestos-Manhattan strictly liable for actual damages in the amount of $391,500. Previously, eight defendants had settled for a total of $45,750. The trial court informed the jury that other defendants had settled, but did not reveal the amounts of the settlements. The jury was instructed:

> You must disregard this fact [of prior settlements] and it should play no part in your deliberations herein. In assessing damages in this case, if any, you must not speculate or attempt to give credit by reason of any settlement or compromise between the plaintiff and any other defendant who is no longer in this case because this is a matter that the court will consider and make proper adjustments for at the proper time in the event that your verdict is for the plaintiff against any one or more or all of the defendants herein.

The trial court subsequently gave the defendants full credit for amounts paid in settlements and reduced the damages award to $345,750.

[26] The defendants argue that the trial court erred in refusing their request to make full disclosure to the jury of the amounts of settlement. We disagree.

Under Mississippi law, a "joint tort-feasor is entiled to credit when another tortfeasor has settled or paid the injured party . . . ." *Wood* v. *Walley*, 352 So. 2d 1083 (Miss. 1977) (en banc). One method of giving credit is to disclose the amounts of settlement to the jury with instructions to credit the remaining defendants for that amount. *See Bogdahm* v. *Pascagoula Street Railway & Power Co.*, 118 Miss. 668, 79 So. 844 (1918) (affirming disclosure of settlement amounts).

The purpose of the Mississippi rule is to prevent double recovery, *Daves* v. *Reed*, 222 So. 2d 411 (Miss. 1969). The district court accomplished this purpose by deducting the amount of the settlements from the jury's award. The jury could have been misled and confused by settlement amounts for atypical minor claims. If the court had let in the amounts of the settlements, it would have been fairly obliged to explain to the jury the nature of the claims, how they compared with the claims here, and other factors too complicated to make such a comparison practicable. The disclosure of the fact of the settlements without amounts prejudiced no one, since the jury may have speculated whether settlement amounts were high or low.

IX. CONCLUSION

We AFFIRM the district court's holding that Jackson is entitled to a strict tort liability cause of action against the defendants and the district court's treatment of settlement amounts; we REVERSE on the admissibility of cancer evidence and of the "Sumner Simpson papers," and on the allowance of punitive damages; and we REMAND this case to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

APPENDIX

"A S B E S T O S"
Published by
SECRETARIAL SERVICE
16th Floor, Inquirer Bldg.
Philadelphia, PA, U.S.A.

September 25, 1935

Mr. Sumner Simpson, President,
Raybestos-Manhattan, Inc.,
Bridgeport, Conn.

Dear Sir:

You may recall that we have written you on several occasions concerning the publishing of information, or discussion of, asbestosis and the work which has been, and is being done, to eliminate or at least reduce it.

Always you have requested that for certain obvious reasons we publish nothing, and, naturally your wishes have been respected.

Possibly by this time, however, the reasons for your objection to publicity on this subject have been eliminated, and if so, we would like very much to review the whole matter in "ASBESTOS".

Our thought is that we could either prepare from data which we have in our files, or obtain from Mr. W. A. Godfrey of the Cape Asbestos Company, London, who is much interested in the subject, an article on the work done in England and then follow it with an article written by someone in your organization, as to the work done here.

We understand from Mr. Stover that your North Charleston plant, contains very complete dust control equipment and a description of such equipment, if you approve, would make a very interesting part of the article. Possibly even you could supply a photograph or two showing some part of this dust control equipment.

We await with much interest your reply. If there is no serious objection it would seem to be a most interesting subject for the pages of "ASBESTOS", and possibly a discussion of it in "ASBESTOS" along the right lines, would serve to combat some of the rather undesirable publicity given to it in current newspapers.

Very truly yours,

"A S B E S T O S"

(s) A. F. Rossiter
A. F. Rossiter
Bridgeport, Conn.
Oct. 1, 1935

Mr. Vandiver Brown, Attorney
Johns-Manville Corp.,
22 East 40th St.,
New York City.

My dear Mr. Brown:

Enclosed is copy of a letter received from Miss Rossiter, of "Asbestos."

As I see it personally, we would be just as well off to say nothing about it until our survey is complete. I think the less said about asbestos, the better off we are, but at the same time, we cannot lose track of the fact that there have been a number of articles on asbestos dust control and asbestosis in the British trade magazines. The magazine "Asbestos" is in business to publish articles affecting the trade and they have been very decent about not re-printing the English articles.

I shall be pleased to have your opinion in the matter.

Very truly yours,
President

SS—G
Enc.

* * * * * *

JOHNS-MANVILLE
Twenty-Two East Fortieth Street
New York, N.Y.

October, 3, 1935

Mr. S. Simpson, President
Raybestos-Manhattan, Inc.
Bridgeport, Conn.

My dear Mr. Simpson:

I wish to acknowledge receipt of yours of October 1st enclosing copy of the September 25th letter from the editor of the magazine "ASBESTOS". I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity. Even if we should eventually decide to raise no objection to the publication of an article on asbestosis in the magazine in question. I think we should warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

I believe the question raised by Miss Rossiter might well be considered at the committee meeting scheduled for next Tuesday, at which I understand both you and Mr. Judd will be present.

Very truly yours,

s/Vandiver Brown
Vandiver Brown
Attorney

VB:T

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

BY THE COURT

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. S79-0211(N)

JAMES L. JACKSON - - - - - - - *Plaintiff*

v..

JOHNS-MANVILLE SALES CORPORATION,
RAYBESTOS-MANHATTAN, INC., and
H. K. PORTER COMPANY, INC. - - - *Defendants*

AMENDED FINAL JUDGMENT—Filed June 14, 1982

This action having come on trial before the Court and Jury, Honorable Walter L. Nixon, Jr., United States District Judge, presiding, and the issues having been duly tried and presented to the Jury, including submission of written interrogations to the Jury on the question of contributory negligence of the plaintiff, and the Jury having found none, and the Jury having rendered its verdict in said cause:

1. IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Plaintiff, James L. Jackson, have and recover of the Defendants, Johns-Manville Sales Corporation and Raybestos-Manhattan, Inc., jointly and severally, actual damages in the amount of $391,500.00; however the Court has determined that prior to the verdict the plaintiff had received the sum of $45,750.00 in settlements with former defendants and that sum should be deducted from the jury's award of actual damages thereby leaving a balance due of $345,750 with interest accruing thereon from the date of the entry of the original final judgment at the legal rate;

2. It Is, Further, Ordered and Adjudged, that the Plaintiff, James L. Jackson, have and recover of the Defendant, Johns-Manvile Sales Corporation, punitive damages in the amount of $500,000.00 with interest thereon at the legal rate;

3. It Is, Further, Ordered and Adjudged, that the Plaintiff, James L. Jackson, have and recover of the Defendant, Raybestos-Manhattan, Inc., punitive damages in the amount of $125,000.00, with interest thereon at the legal rate;

4. It Is, Further, Ordered and Adjudged, that the Plaintiff, James L. Jackson, have and recover nothing from the Defendant, H. K. Porter Company, Inc., and said Defendant is hereby dismissed;

5. It Is, Further, Ordered and Adjudged, that all cost herein be taxed to the Defendants, Johns-Mansville Sales Corporation and Raybestos-Manhattan, Inc., jointly and severally.

So Ordered and Adjudged, this 11th day of June, 1982.

(s) Walter F. Nixon, Jr.
United States District Judge

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Federal Rules of Decision Act, 28 U.S.C. § 1652, provides as follows:

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Act of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

No. 85-1583

Supreme Court, U.S.
FILED
MAY 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

JOHNS-MANVILLE SALES CORPORATION AND RAYBESTOS-MANHATTAN, INC.,
Petitioners,

vs.

JAMES LEROY JACKSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 85-1583

In The

Supreme Court of the United States

October Term, 1985

JOHNS-MANVILLE SALES CORPORATION AND RAYBESTOS-MANHATTAN, INC.,

Petitioners,

vs.

JAMES LEROY JACKSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

James L. Jackson was employed at the Ingalls Shipyard in Pascagoula, Mississippi for approximately eighteen years. During that time he was exposed on a daily basis to dust from asbestos insulation products manufactured by the petitioners and others. At no time during his employment at Ingalls was Jackson warned that breathing asbestos dust might be harmful to his health. Approximately seven years after leaving Ingalls Jackson was diagnosed as having asbestosis, an incurable and progressive disease of the lungs caused by inhaling asbestos fibers.

Jackson filed suit on December 15, 1978 invoking the diversity jurisdiction of the federal court and seeking com-

pensatory and punitive damages against twelve defendants who manufactured the asbestos-containing materials to which he was exposed. Jackson settled with all but four defendants before trial and with one defendant during trial. His case against the remaining defendants was tried before a jury in May and June, 1982, on a theory of failure to warn under strict liability.

At trial, Jackson offered evidence that he was permanently disabled and his condition was expected to worsen. Estimates of his present disability ranged from fifteen to seventy percent. Several of Jackson's medical experts testified that based upon reasonable medical probabilities Jackson would contract cancer as a result of his condition and exposure to asbestos.

Jackson also offered evidence that as early as the 1930's these petitioners knew that asbestos was harmful, yet for decades followed a deliberate and calculated policy of concealing this information from the public by various means of deception and misrepresentation. The defendants denied that Jackson had asbestosis and contended that they were unaware that asbestos was harmful during the time of Jackson's exposure. Confronted with this record, the trial judge allowed the jury to consider awarding punitive damages which is permitted under Mississippi law for conduct "so gross as to indicate reckless or wanton disregard for the safety of others."

As required under Mississippi law, Jackson offered evidence of the financial worth of these petitioners in support of his request for punitive damages. The petitioners offered no evidence of their inability to pay punitive damages or of the number or amount of punitive damage

awards assessed against them. They took the position, which they have maintained throughout this litigation, that punitive damages should not be allowed as a matter of law regardless of the extent of their misconduct. On June 3, 1982 the jury found in favor of one defendant and awarded Jackson actual and punitive damages against these petitioners.

SUMMARY OF ARGUMENT

The Fifth Circuit, sitting en banc, correctly concluded that it would be entirely inappropriate to create a federal common law of asbestos litigation. The decisions of this Court make clear that the instances of federal judicial law-making are "few and restricted" and require "congressional authorization to formulate substantive rules of decision" or a "uniquely federal concern." Neither is present in this case.

The decision below is buttressed by considerations of federalism and separation of powers. In the absence of a congressional or constitutional directive, federal courts should not intrude on legitimate spheres of state authority. As the Fifth Circuit sensibly decided, the challenge of the asbestos litigation is one that Congress should face or be left to the states.

Finally, this Court should decline the petitioners' invitations to draft an asbestos litigation statute. The pitfalls of attempting to do so are infinite and evidence

abounds that progress is being made on managing these difficult cases on other fronts.

REASONS FOR DENYING THE WRIT

1. This Court's Precedents Make It Clear That There Is No Basis For Creating A Federal Common Law Of Asbestos Litigation And The Decision Below Should Not Be Disturbed.

Any discussion of federal common law must begin with *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), in which this Court established that federal courts do not have the general lawmaking powers exercised by state courts. *Erie* held that because the federal courts are courts of limited jurisdiction: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. * * * There is no federal general common law." 304 U.S. at 78. It is true that since *Erie,* this Court has recognized "a responsibility in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern." *Northwest Airlines, Inc. v. Transport Workers Union of America,* 451 U.S. 77 (1981). These instances, however, are "few and restricted." *Wheeldin v. Wheeler,* 373 U.S. 647 (1963). Even with respect to the kinds of cases that do raise issues of "uniquely federal concern," this Court has recently stated:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned

> with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

Although petitioners concede that Congress has yet to take any action to remedy the problems of asbestos exposure, so that there is no "congressional authorization to formulate substantive rules of decision," they imaginatively argue that the potential conflict among plaintiffs for the limited resources of the asbestos companies is analogous to the interstate conflicts over water rights and pollution that have been held to involve uniquely federal interests. They necessarily rely on *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Both cases are inapposite because they involved a conflict between states as quasi-sovereign bodies over shared resources. Under those circumstances, a single state's statutes or decisions could not be considered conclusive. In the realm of asbestos litigation, on the other hand, any conflict among plaintiffs, even assuming one to exist, may transcend state lines but does not involve the rights and

duties of states as political entities.[1] Clearly, if federal courts are to remain courts of limited powers as *Erie* requires, a dispute over a common fund or scarce resources cannot become "interstate," in the sense of this Court's *Texas Industries* opinion, merely because the conflict is not confined within the boundaries of a single state.

Petitioners also argue that there is a uniquely federal interest "in preventing the unregulated exhaustion of finite compensatory resources" by awards under state law. (Pet. 17) They claim that the "inevitable" result of what they call "this interstate judicial fiasco" will be (1) the preference of present over future claimants; (2) the financial ruin of a national industry; and (3) an ultimate burden on the federal purse. With continued clairvoyance they assert that this triumvirate of horribles would be substantially lessened by the creation of federal rules restricting the types of damages recoverable in asbestos suits.

Petitioners misconceive the nature of the uniquely federal interest requirement. "Uniquely federal interests" are not merely national or important concerns, and the existence of these concerns, no matter their significance, cannot by themselves give federal courts the authority to supersede state policy. Indeed, as this Court recently stated, "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal

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[1]Some conflict over the resources of the asbestos industry would not be among plaintiffs in different states but among plaintiffs in the same state or among past, present and future plaintiffs.

judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) (Milwaukee II). The court below was entirely correct in concluding that to be "uniquely federal" and thus a sufficient predicate for the imposition of a federal substantive rule, an interest "must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign." 750 F.2d at 1325. Far from being "unfounded," as petitioners assert, this Court's decisions clearly support the Fifth Circuit's statement. See, e.g., *Texas Industries, supra*, at 641 (authority and duties of United States must be "intimately involved"); *Northwest Airlines, supra*, at 95 (uniquely federal concern is "the definition of rights and duties of the United States"), *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (federal law governs rights of United States arising under nationwide federal program); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (federal common law governs rights and duties of United States on commercial paper which it issues).

Neither exists in the asbestos context. Although individual members and committees of Congress have expressed concern about asbestos litigation, see Product Liability Act, S. 44, 98th Cong., 1st Sess. (1983); *Occupational* Disease Compensation Act of 1983, H.R. 3175, 98th Cong., 1st Sess. (1983); Asbestos Workers Recovery Act of 1984, S. 2708, 98th Cong., 2d Sess. (1984), Congress itself has yet to formulate any policy on this issue. Moreover, petitioners have been unable to point to any substantial right or duty of the federal government that would

be directly affected by this litigation's outcome. Any effect state law recoveries eventually might have on the "federal purse" is far too indirect and hypothetical to justify the imposition of federal common law. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 993 (2d Cir. 1980) (no federal policy at stake in war veterans' action against manufacturers of defoliants used in Vietnam War that is sufficient to warrant creation of federal common law), *cert. denied*, 454 U.S. 1128 (1981); *cf. Miree v. DeKalb County*, 433 U.S. 25, 29-32 (1977) (federal interest in air travel insufficient basis for creation of federal law in action between private parties that will have no direct effect on United States or its treasury); *Bank of American National Trust & Savings Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956) (interest of government too speculative and remote in action between private parties that does not touch rights and duties of the United States). Similarly, ensuring the availability of compensation for injured plaintiffs, whether present or future, is predominately a matter of state concern and, in the absence of congressional enactments, state law, both as to the extent of compensation and the availability of punitive damages, must apply. As recently as two years ago, this Court reaffirmed this basic principle of American federalism when it stated in a related context: "Punitive damages have long been a part of traditional principles of state law. As noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

The court below was correct in characterizing petitioners' invocation of federal common law as little more

than a request that federal judicial power be exercised on the basis of the federal courts' own interest in "doing justice." Although federal courts may have an institutional interest in maintaining a federal judicial system that is fundamentally "just," such an abstract, all-encompassing interest is not a sufficient basis upon which to rest the displacement of state law. First, implicit in *Erie* is the idea that in diversity actions federal court concerns in a just judicial system is not a reason for supplanting substantive state policies. Second, certainly as a practical matter, resting assertions of federal judicial power on so vague an interest as "justice" would eviscerate *Erie* completely and thus ignore its constitutional underpinnings. Third, this Court itself already has rejected a similar interest in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). In that diversity case, the plaintiff argued, *inter alia*, that the federal court's equitable powers and discretion constituted an exception to *Erie* and that, therefore, the federal court was not bound by a state statute of limitations. The Court, in rejecting the plaintiff's claim stated:

> But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

Id. at 108-09. A federal court's interest in "doing equity" is analogous to its interest in "doing justice." It is doubtful that this Court in *Guaranty Trust* would have displaced state law if the plaintiff additionally had shown

that the applicable state statute of limitations was "unjust." Obviously, if justice could be used as a justification for the naked exercise of federal judicial power, this Court's oft-repeated assertion that the instances in which federal common law governs are "few and restricted" no longer would be true. *Cf. Texas Industries, Inc., supra,* at 640 (denying rights of contribution against antitrust co-conspirators).

Finally, petitioners' cavalier request that this Court fashion a federal common law in the context of asbestos litigation ignores enormous pragmatic obstacles. There is no easily applied governing principle for imposing federal common law in this context. Although plaintiffs' recovery depends in large part on the availability of punitive damages and the scope of the actionable injury, many other aspects of the litigation simlarly play a significant role in determining the size of potential awards. The applicable limitations period for bringing an action, for example, has a direct impact on aggregate recovery and thus the availability of funds for future claimants. The truth is that, once the need to limit plaintiffs' recoveries is used to justify the creation of federal substantive rules precluding the recovery of punitive damages and narrowing the scope of the actionable injury, there is no principled means of restricting the application of federal common law to other matters, either in the context of asbestos litigation or in other contexts. As a consequence, federal courts would become increasingly responsible for establishing a general federal tort law in a manner inconsistent with the teachings of *Erie* and the logic behind our federal system. *Cf. Parratt v. Taylor,* 451 U.S. 527, 544 (1981) (due process clause not intended to be "a font of tort law

to be superimposed upon whatever systems may already be administered by the States") (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

Moreover, displacing state law in asbestos cases would require federal courts to reexamine the major issues and principles involved in asbestos litigation, most of which are presently settled under state tort law. As a result, the progress of currently pending asbestos cases through the federal court system would come to a virtual standstill. The need to ensure quick resolution of the claims militates strongly against taking such action. In sum, this case simply is not an appropriate one for the creation of federal common law because a uniquely federal interest is absent and the practical problems that would attend the displacement of state law are insoluble.

2. Considerations Of Federalism And Separation Of Powers Require The Rejection Of Creating A Federal Common Law Of Asbestos Litigation And Further Review Of The Decision Below Is Unnecessary.

Basic principles of federalism and separation of powers support the decision below not to create the broad federal common law requested by petitioners, making further review by this Court unnecessary. Absent congressional authorization to do so, the federal courts should not resort to federal common law every time they think a gap in the law existed or believe it desirable to do so. "Every exercise of federal common lawmaking power takes away from powers of states." Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv.L.Rev. 883, 926 (1986). Expansion of federal common law reduces the ambit in which state law can operate; it diminishes its

scope and demeans its importance. Concomitantly the creation of federal common law expands the jurisdiction of the federal courts, typically at the expense of state court jurisdiction, which violates the principle that Congress should determine the business of the federal courts.

This Court's insistence that there be "congressional authorization to formulate substantive rules of decision," reflects the view that it is appropriate for Congress to adjust the federal-state balance and inappropriate for the federal courts to enlarge federal power and thereby diminish the states' authority. As a distinguished commentator has observed recently:

> Our system has been that the balance between the states and the federal government is to be adjusted primarily through Congress, where state interests are represented, and not through the politically insulated federal judiciary. The history of the Constitution suggests that states were willing to cede powers to Congress because their interests were safeguarded there. Although some of the protections that originally existed have been displaced, by subsequent constitutional and other changes, the point nonetheless remains valid that state interests and viewpoints on particular issues are reflected in the Congress in ways that they cannot predictably be in the Supreme Court. For this reason, we have required, at least in name, that the decision to displace state law with federal law should be made by the Congress and not by the courts.

Field, supra, at 932-33.

Moreover, Congress is in a far better position to create a new body of law than the courts, especially in the mass tort field with its need for economic policy making and political overtones. Congress is able to act on a com-

prehensive, systematic, and comparatively uniform basis, whereas the courts must act in an interstitial fashion. Congress' investigative and fact-finding capacities stand in sharp contrast to the limitations imposed on the judiciary by the facts of individual cases and the information supplied by the courts by particular litigants. Nor do the federal courts have Congress' ability to maintain oversight or resort to an administrative delegation, should that seem wise. As the judges of the Fifth Circuit wisely recognized, there is little to commend the federal courts "going first" to displace state law on the scale suggested by petitioners.

That there is no "congressional authorization to formulate substantive rules of decision," *Texas Industries*, 451 U.S. at 641, for tort actions in general, or mass torts or even asbestos litigation in particular is obvious. Petitioners cite none nor can they rely on the Commerce Clause since that provision of the Constitution has never been interpreted to permit the generation of federal common law when congress has not acted. Early in our history it was determined that congressional silence in the interstate commerce context left the states free to act unless Congress' inaction could be construed as a mandate to leave the area totally unregulated. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851). See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824).

The court below wisely understood the federalism and separation of powers concerns that underlie every question of federal common law, let alone one with the massive implications presented by the petitioners' argument in this case. Its rejection of the invitation to federalize a mas-

sive area of state tort law is the only acceptable response and requires no further review or delay.

Although federal common law may at times be a "necessary expedient," *Milwaukee II, supra,* at 314 (quoting *Committee for Considerations of Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc)), under our federal system Congress is generally the body responsible for balancing competing interests between the states and the federal government and setting national policy. Whatever the need for federal legislation in the field of asbestos litigation may be, Congress' silence on the matter hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions. Displacement of state law is primarily a decision for Congress, and Congress has yet to act. See *Miree, supra,* at 32. Accordingly, the decision below should be allowed to stand.

3. Certiorari Should Be Denied Because It Would Be Extremely Unwise For This Court To Legislate A Federal Common Law Of Asbestos Litigation As The Problem Is Best Dealt With By Other Means.

Implicitly acknowledging the difficulties of creating a federal law of torts that can be contained to asbestos litigation, the petitioners have drafted a five-part statute that they suggest be enacted by this Court. (Pet. 21-29) Its obvious ambiguities and porousness demonstrate how ill-conceived it would be for this Court to embark on a law-making odyssey of the suggested magnitude without any of the resources and fact-finding abilities of Congress. Moreover, petitioners' "criteria" are likely to engender endless litigation as to the applicability, creating signifi-

cant risks of inconsistency of treatment, inordinate delays and expenditures to adjudicate issues having nothing to do with the merits of litigation, and heightened confusion and instability. Questions abound. What constitutes a "substantial probability that dissipation of limited funds * * * will foreclose the opportunity for recovery of compensation by subsequent claimants"? (Pet. 21) When does an interstate contest for funds "clearly affect * * * the extent of recovery available to * * * others"? (Pet. 23) When "does the case implicate other cognizable federal interests"? (Pet. 27) Finally, totally ignored by petitioners in their frenetic search for The Magic Bullet to cure the malady of asbestos litigation are considerations of federalism and the legitimate interests of states in deterring and punishing certain forms of conduct within their borders.

A far more appropriate course for this Court to follow is to deny this petition and allow Congress to formulate national policy concerning asbestos litigation, if it deems it wise to do so. In the interim, there is considerable evidence that the courts—both state and federal—are making progress in meeting the challenge of the asbestos cases in a variety of rational ways that are far less drastic and damaging to Our Federalism than creating a federal law of torts by judicial fiat. Claims are being collectivized by so many courts through effective and innovative consolidation and class action techniques. See e.g., *In re Asbestos School Litigation*, slip op. no. 84-1642 (3d Cir. May 1, 1986); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986). Cases are being disposed of more rapidly through settlement and increased pressure toward trial.

There is a growing recognition that punitive damages must be calibrated with reference to the defendant's conduct toward the particular plaintiff and bear some relationship to the compensatory damages being awarded and that trial judges must exercise control to achieve that end. See, e.g., *Thirty v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983). Finally, an increasing number of courts have indicated that whatever the legitimacy of punitive damages may be, they should be used to "hurt, but not bankrupt a defendant." *Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F.Supp. 226, 232 (M.D. Fla. 1974) (Florida law). See also *National Bank of Monticello v. Doss*, Nos. 4-85-0068, 4-84-0271 (III. App. Ct. March 19, 1986); *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 693 P.2d 348 (Ariz. Ct. App. 1984). The proper role for this Court is to continue to function as an appellate tribunal, rather than as a legislature, to guard against violations of constitutional principles and other fundamental precepts of American justice. Further review of this action is unnecessary.

———o———

CONCLUSION

Respondent urges this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and to allow its mandate to become effective.

Respectfully submitted,

JAMES L. JACKSON,
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NO. 85-1583

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHNS-MANVILLE SALES CORPORATION
and RAYBESTOS-MANHATTAN, INC. - Petitioners

versus

JAMES LEROY JACKSON --- Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE KEENE CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF KEENE CORPORATION

Pursuant to Rule 36.1 of this Court's Rules, Keene Corporation, having been unable to obtain the consent of all the parties, moves for leave to file the attached brief Amicus Curiae in support of the petitioners for the following reasons:

1. Asbestos-related litigation affects thousands of plaintiffs and numerous defendants including Amicus Keene Corporation.

2. Amicus Keene Corporation's arguably minimal contact with the asbestos thermal insulation business has, nonetheless, resulted in it being named a defendant in more than 34,000 lawsuits. Inevitably, the vast majority of these lawsuits seek punitive damages against all defendants.

3. Amicus Keene Corporation believes that the awarding of costly punitive damages against the same defendants over and over again does not further a legitimate federal or state interest and violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Amicus Keene Corporation has a substantial interest in any petition or decision which addresses the validity of punitive damage awards in asbestos-related litigation, and its brief presents an important and different perspective on the issues before this Court, and Amicus Keene Corporation respectfully submits that this

motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE AND BACKGROUND OF THE CASE

Amicus Keene Corporation ("Keene") respectfully urges that this Court grant certiorari in this case because the repetitious awarding of punitive damages against defendants in the context of asbestos mass tort litigation is violative of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

Keene, like petitioners Johns-Manville Sales Corporation and Raybestos-Manhattan, Inc., has been named a defendant in thousands of asbestos-related lawsuits. Keene itself has never manufactured or sold any thermal insulation products containing asbestos. Its involvement with thermal insulation products containing asbestos stems only from its 1968 stock acquisition of Baldwin-Ehret-Hill, Inc., ("BEH") a company which manufactured such products.

The acquired company was operated as a wholly-owned subsidiary for four years, during which time all asbestos was removed from those products which contained it.

At least 34,000 claimants have already filed asbestos-related suits against Keene and an additional 500 lawsuits are being filed each month.[1] Over one billion

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1. Kakalik, Ebener, Felstiner & Shanley, Costs of Asbestos Litigation, 12 (Inst. for Civ., Just., Rand Corp. 1984) ("Rand Report"). This does not take into account the emergence of over a hundred asbestos-related property damage lawsuits that have been filed by numerous state and local governments which seek not only compensation for the cost of removing asbestos containing materials from public buildings but also punitive damages. The United States Department of Education has predicted that the cost of asbestos abatement in schools could reach $1.4 billion. See In re Johns-Manville Corp., 36 B.R. 727, 739 (Bankr. S.D.N.Y. 1984) (citing U.S. Dept. of Education, Asbestos in The Schools: A Report to Congress 26-27 (1979)). In fact, in two recent property damage cases over $4 million has been awarded in punitive damages against two defendants. Corporation of Mercer University v. National Gypsum Co., No. 85-126-3-MAC (M.D. Ga. April 11, 1986); City of Greenville v. W.R. Grace & Co., No. 6:85-1693-14 (D.S.C. Jan. 24, 1986).

dollars already has been expended by all the asbestos defendants and their insurers in asbestos-related litigation. Kakalik, Ebener, Felstiner, Haggestrom & Shanley, Variation in Asbestos Litigation Compensation and Expenses, (Inst. for Civ. Just., Rand Corp. 1984). As the Fifth Circuit noted below in Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 524 (5th Cir. 1984) ("Jackson I"), "the scope of this mass litigation is without precedent and practically without dimension."

Although the present amount spent by all of the asbestos defendants is unquestionably massive, the future costs of compensating prospective asbestos claimants potentially will exceed the amount of monies expended by defendants to date. According to the Fifth Circuit's Appendix in Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1339 (5th Cir. 1985) ("Jackson

II"), the New York Academy of Science estimates the social costs resulting from asbestos exposure at between $39 billion and $74 billion over the next 25 years (citing Special Project, An Analysis of the Legal, Social, and Political Issues Raised by the Asbestos Litigation, 36 Vand. L. Rev. 573, 581, n.21 (1983)).

In addition to compensatory claims, plaintiffs alleging asbestos-related injuries usually assert claims of punitive damages against all defendants. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37 (1983). Professor Seltzer quoted one commentator for the general proposition that "whereas 25 years ago, the punitive damage case was a rarity, today it is an anomaly when one sees a complaint which does not seek punitive damages." Id. at 48

(citing Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 Ins. L.J. 257, 259 (emphasis in original)). Thus, many defendants which vary in size from small privately-held companies to large publicly traded companies are sued for punitive damages regardless of whether their presence in the asbestos litigation results from the ownership of a fully integrated asbestos business, including the mining and milling of raw asbestos and long-term manufacture of asbestos-containing end products, or the short-term ownership of a subsidiary company which purchased and made asbestos-containing thermal insulation products.

There is no question that asbestos-related litigation presents a national problem that clearly implicates a federal interest to ensure that all citizens are protected. Amicus Keene believes that the

very awarding of punitive damages repeatedly against the same defendants is against public policy, and constitutionally infirm.

CONSENT OF THE PARTIES

Although counsel to James Leroy Jackson, Respondent, has refused to consent to the filing of this amicus brief, Johns-Manville Sales Corporation and Raybestos-Manhattan, Inc., Petitioners, consent to Keene's submission of this brief.

ARGUMENT

I.

THE ALLOWANCE OF PUNITIVE DAMAGES IN THE MULTIPLE-CASE PRODUCTS LIABILITY CONTEXT VIOLATES THE EXCESSIVE FINES AND THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSES OF THE EIGHTH AMENDMENT AND IS CONTRARY TO PUBLIC POLICY

The Eighth Amendment to the United States Constitution unequivocally prohibits the imposition of excessive fines or cruel

and unusual punishments. It states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. This Court has observed that "[s]ome punishments, though not labeled 'criminal' by the state, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1977); id., at 685 (White, J. dissenting). Because punitive damages are intended to punish and deter, the imposition of multiple and severe monetary awards against a party must be viewed as tantamount to criminal punishment and therefore subject to the constitutional limitations of the Eighth Amendment. See, e.g., Trop v. Dulles, 356 U.S. 86 (1958) (wherein this Court found the Eighth

Amendment to be applicable in a non-criminal proceeding.)

This Court recently recognized that whether a retrospective "$3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment;" and whether the "lack of sufficient standards governing punitive damages awards . . . [under Alabama law] violates the Due Process Clause of the Fourteenth Amendment ... raise[s] important issues which, in an appropriate setting, must be resolved." Aetna Life Insurance Co. v. Lavoie, ___ U.S.L.W. ___ (U.S. April 22, 1986). Keene submits that this case presents the "appropriate setting" to resolve these issues.

The purpose of punitive damages is to punish and deter wanton, willful or grossly reckless conduct. Punitive damages do not serve an appropriate function in the

asbestos litigation and their multiple imposition violates the Eighth Amendment's prohibition of excessive fines. Historically, punitive damages arose in intentional tort cases at a time when the scope of compensable injuries was much narrower and the scope of government regulation was more limited than today. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) ("Roginsky").[2] As a result, punitive damages served as a means of indirectly responding to otherwise noncompensable injury and, at the same time, satisfying societal objectives of punishment and deterrence. City of Newport v. Fact Con-

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2. The early punitive damage cases primarily involved "ungentlemanly" behavior of the defendant that was particularly humiliating to the plaintiff. (See Roginsky, 378 F.2d at 838). Persons injured by defective products for the most part do not suffer such personal humiliation and embarrassment; their injuries are different and much more easily susceptible to compensatory calculation based on earning formulas and the like.

certs, Inc., 453 U.S. 247 (1981); Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977).

Today, the justification for allowing punitive damages is considerably less obvious. The scope of compensable injuries has grown dramatically so that indirect compensation by way of punitive damages is no longer necessary.[3] The proliferation of criminal and regulatory statutes (such as the Occupational Safety and Health Act)[4] and regulatory agencies with protective functions (such as the Environmental

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3. "Items such as mental pain and suffering, hurt feelings, and wounded dignity are now included in the determination of actual damages, and therefore the compensatory role of punitive damages has been filled by actual damage awards. Stated simply, the purpose for which punitive damages were created no longer exists. The doctrine is an anachronism and should be abolished." Duffey, J.E., Jr., "Punitive Damages: A Doctrine Which Should be Abolished" in Defense Research Institute: The Case Against Punitive Damages (D.J. Hirsch & J.G. Pouros eds., 1969).

4. Pub. L. 91-596 (Dec. 29, 1970).

Protection Agency) demonstrates that the government has assumed greater responsibility for punishment and deterrence than before.[5] The needs that punitive damages were intended to satisfy are now less acute.

Claims for punitive damages, historically, were first made in single party lawsuits. See, e.g., Roginsky, 378 F.2d at 838-39. Where, as here, thousands of products liability plaintiffs are asserting basically the same claim in separate lawsuits all over the United States, the recovery of multiple, cumulatively devastating awards has in fact occurred[6], and

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5. Today, the principal instances where penalties are paid to private plaintiffs are in connection with specific statutes and regulatory schemes, as, for example, the right to treble damages under various state and federal antitrust laws.

6. The Fifth Circuit noted in its appendix in Jackson II that nearly $40 million in punitive damages had been awarded in the asbestos cases tried through

(footnote continued)

the inappropriateness of awarding punitive damages in each such action becomes obvious. As the court in Roginsky correctly observed:

> "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded [$100,000] these would run into tens of millions. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." 378 F.2d at 839.

(footnote continued from previous page) 1982. 750 F.2d at 1338. (citing Special Project, supra, p. 4, at 707 n. 853). That court's appendix indicated that the number of punitive awards has substantially increased from nineteen in 1980-1982 to thirty in 1983. 750 F.2d at 1338-39 (citing Rand Report, supra and Brownstein, "Asbestos Litigation: A Legal Nightmare That Congress is Being Asked to End", 15 Nat'l J. 1942, 1946 (1983)). Such awards are becoming more numerous and larger. Id. For example, in Kaowili v. Johns-Manville Corp., Civ. No. 58147 (Haw. Cir. April 22, 1985) plaintiff received a $3 million punitive damages award against petitioner Raybestos-Manhattan, Inc.

Beyond the obvious injustice inherent in a "civil remedy" which penalizes a defendant repeatedly and in vast excess of either the corresponding criminal penalty or the actual damages sustained, the net effect is to penalize the stockholders of the defendants and the general public in the form of higher consumer prices. Roginsky, 378 F.2d at 841. In Roginsky, the Court stated:

> "[T]he apparent impracticality of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts. If liability policies can protect against this risk as several courts have held, the cost of providing this probably needless deterrence, not only to the few manufacturers from whom punitive damages for highly negligent conduct are sought but to the thousands from whom it never will be, is passed on to the consuming public; if they cannot, as is held by other courts and recommended by most commentators, a sufficiently egregious error as to one product can end the business life of a

> concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." Id.

Indeed, two courts have dismissed punitive damage claims in asbestos cases on the ground that they are inappropriate in multiple-plaintiff product liability actions. In Erwin v. Johns-Manville Sales Corp., No. C-3533 (Tenn. Cir. Jan. 27, 1982) the court held that in every asbestos case before the court, punitive damages would not be considered at trial as a matter of law:

> "It is the opinion of this Court that in multiple plaintiff products liability actions the large number of actions and potential compensatory awards serves as sufficient punishment and deterrence and hence an award of punitive damages is unwarranted."

Similarly, in La Brecque v. Johns-Manville Sales Corp., Civ. No. H-77-201, transcript

at 2356-2362 (D. Conn. Feb. 17, 1982), Judge Blumenfeld dismissed plaintiffs' claims for punitive damages, following Judge Friendly's reasoning in Roginsky:

> "[T]he Defendants are open to punishment by way of punitive damages even in jurisdictions which will not limit the amount as they do in Connecticut, in many states throughout the country, and in hundreds, maybe thousands of cases.
>
> Well, you might run into what Mr. Rottner yesterday said, that this would be cruel and unusual punishment, or might be double jeopardy if they're going to be punished in every case for every Plaintiff, because there may be a thousand cases.
>
> . . . .
>
> So, I mean, it's not just this case, it's hundreds of other cases, and I don't think that punitive damages are designed to be given to one Plaintiff or each one of hundreds of Plaintiffs in order to punish a Defendant for one course of conduct."
> Transcript at 2359.

The court below erroneously rejected this reasoning. While society has favored the

compensation of persons injured by imposing strict liability upon the manufacturer of a product under the assumption that the manufacturer and society are in a better economic position to share the cost of these injuries, W. Prosser, Torts (4th Ed. 1971) § 100, this rationale does not apply to punitive damages which amount to a windfall for the plaintiff. After plaintiff's injuries are compensated, the plaintiff's equities are not greater than the consumers or the innocent stockholders of a manufacturer.

The twin objectives of deterrence and punishment will not be furthered by assessing punitive damages against Amicus Keene and other asbestos litigation defendants because the asbestos defendants have already expended hundreds of millions of dollars to compensate thousands of plaintiffs previously exposed to asbestos-con-

taining products. Furthermore, defendants must continue to compensate injured asbestos plaintiffs in the future. Thus, the payment of compensatory damages alone should serve as a sufficient punishment and deterrent and the large number of lawsuits filed monthly demonstrates that prospective plaintiffs in asbestos cases do not need an additional incentive to bring such actions. The role of compensatory damages under these circumstances accomplishes the purposes sought to be attained through the assessment of punitive damages.

Moreover, the systematic and multiple awarding of punitive damages against the same defendants over and over again is violative of the excessive fines clause of the Eighth Amendment, constitutes cruel and unusual punishment under the same Amendment, and will create numerous and intract-

able legal and economic problems.[7] As the court in Jackson I pointed out, "excessive punishment is antithetical" to the objectives underlying punitive damages. 727 F.2d at 526.

II.

THE STANDARD FOR PUNITIVE DAMAGES IS CONSTITUTIONALLY VOID FOR VAGUENESS

The assessment of punitive damages in a civil action goes beyond mere compensation; it is, instead, a penalty and, as such, brings into operation certain requirements and procedural protections mandated by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.[8]

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7. See, e.g., In re UNR Industries, Inc., No. 82-B-9841 through 82-B-9851 (Bankr. N.D. Ill. filed July 29, 1982); In re Amatex Corp., No. 82-05220-K (Bankr. E.D. Pa. filed Nov. 1, 1982); In re Johns-Manville Corp., Nos. 82-B-11656 through 11676 (BRL) (Bankr. S.D.N.Y. filed Aug. 26, 1982).

8. The Eighth Amendment is cited supra, (footnote continued)

It is immaterial, for constitutional purposes, that the imposition of punitive damages is labeled as civil or is directed against property and not person:[9]

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label

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(footnote continued from previous page) p. 7. The Fifth and Fourteenth Amendments provide as follows:

Amendment V

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

Amendment XIV

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

9. It is evident that criminal statutes and punitive damages share identical objectives -- punishment and deterrence.

> a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." Giaccio v. State of Pennsylvania, 382 U.S. 399, 402 (1966). (emphasis supplied)

As the Supreme Court stated in Ashton v. Kentucky, 384 U.S. 195, 200 (1966):

> "Vague laws in any area suffer a constitutional infirmity."

The punitive damages alleged in this action are far from insubstantial and hence more than sufficient to warrant constitutional scrutiny.[10] Accordingly, it must be determined whether the standard for punitive damages passes constitutional muster. A review of the standards applied indicates that they are constitutionally deficient.

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10. Respondent Jackson has been awarded $500,000 and $125,000 in punitive damages against Johns-Manville Sales Corporation and Raybestos-Manhattan, Inc., respectively. As stated earlier, $40 million in punitive damages has been assessed against defendants in the asbestos litigation and hundreds of millions of dollars more are sought in punitive awards.

In Mississippi, the standard is defined as acting "maliciously" with ill will or spite, or "wantonly" with a callous disregard for the rights of the plaintiff. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 404 (5th Cir. 1986) (Jackson III).[11]

The above standard is constitutionally defective in that it fails to meet the constitutional requirements that a law

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11. Other state punitive damage standards are similarly vague. See, e.g., in California, as acting with "evil motive" or "conscious disregard of safety", G.D. Searle & Co. v. Superior Court of Sacramento County, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); in New York, as acting "recklessly" in "gross deviation" from reasonable conduct so as to be "close to criminality", Roginsky, 378 F.2d at 843; in Ohio, as "actual malice" where "a person's conduct is characterized by hatred or ill will, Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081, 1097 (N.D. Ohio 1975), modified on other grounds, 591 F.2d 352 (6th Cir. 1978); in Pennsylvania, as "outrageous conduct" that consists of "acts done with a bad motive or with a reckless indifference to the interests of others," Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963).

be sufficiently definite so as to apprise the public of prohibited conduct and to supply the judge and jury with limits concerning its application:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." Giaccio, 382 U.S. at 402-03 (emphasis supplied).

Based on the above standard, a potential target of a punitive damage claim is without adequate guidance as to the type of conduct that is prohibited. For example,

how could Amicus Keene foresee that its purchase of stock of BEH in 1968 could serve as the basis of claims for punitive damages in thousands of lawsuits? The overwhelming uncertainty in determining what constitutes culpable conduct in these instances requires invocation of the void-for-vagueness doctrine. The punitive damage standard thus is essentially no more definitive or predictive than the standard "misconduct," which has been held to be constitutionally infirm. See Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969). As the Supreme Court in Giaccio remarked in connection with a similar vague jury instruction:

> "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible conduct.' If used in a statute which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the

> requirements of the Due Process Clause." 382 U.S. at 404.

Like other similarly vague penal standards, the vague standard for punitive damages applied below is constitutionally defective.

III.

PUNITIVE DAMAGES LACK REQUIRED CONSTITUTIONAL PROCEDURAL SAFEGUARDS

The standards for imposing punitive damages are constitutionally infirm for the additional reason that they fail to provide the constitutional safeguards accorded those accused of a crime. Application of such safeguards in the punitive damage context is both appropriate and constitutionally compelled. As one commentator has observed:

> "If the theory and practical operation of the award of punitive damages is substantially the same as the rationale and effect of the criminal sanction, it would seem that any procedural dichotomy should be discarded. Logic and justice compel the

> implication of a uniform procedure.
>
> * * *
>
> "An award of punitive damages, stripped of its specious 'civil' label, constitutes an imposition of a criminal fine in purpose, form, and effect, and is, therefore vulnerable to various constitutional objections." Ford, T.A., "The Constitutionality of Punitive Damages" in Defense Research Institute The Case Against Punitive Damages, (D.J. Hirsch & J.G. Pouros eds. 1969) at 15, 18.

Criminal defendants enjoy important constitutionally derived procedural safeguards. One such safeguard is the protection against double jeopardy guaranteed by the Fifth Amendment to the United States Constitution, which provides in relevant part:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

In contrast, civil defendants in a case where punitive damages are being

sought are provided with no assurance that once they have prevailed in that action on the punitive damages question, they will not be held liable for punitive damages in a second or third action for the same alleged misconduct. Although Amicus Keene has been found not liable for punitive damages in an asbestos-related case brought by plaintiffs in Tennessee,[12] the fact is that Amicus Keene is subject to potential liability with respect to the same penal sanction on the basis of the same conduct in other lawsuits. This is in direct conflict with the constitutional prohibition against double jeopardy.

Moreover, a defendant in a criminal action must be found guilty beyond a reasonable doubt before a penal sanction may attach. See e.g., In re Winship, 397

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12. Campbell v. Johns-Manville Corp., C.A. No. 3-788-185 (E.D. Tenn., Dec. 7, 1978).

U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979). In contrast, a defendant in a punitive damage action is not provided with the same evidentiary safeguard. As a result, a defendant in a punitive damages action is faced with massive penal liability that might never be established if a criminal burden of proof were applied. Given the penal nature of punitive damages, such a deprivation is violative of the Constitution.

The Fifth Amendment to the United States Constitution also provides for indictment by a grand jury and protection against self-incrimination:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself. . . ."

The Sixth Amendment guarantees the criminal defendant trial by jury, which has

been interpreted to require the unanimous verdict of 12 of his peers. 18 U.S.C. § 31(a). United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Sexton, 456 F.2d 961 (5th Cir. 1972). Furthermore, the criminal defendant is presumed innocent until proven guilty. Taylor v. Kentucky, 436 U.S. 478 (1978); Estelle v. Williams, 425 U.S. 501 (1976); In re Winship, 397 U.S. 358 (1970); Coffin v. United States, 156 U.S. 432 (1895).

These valuable and constitutionally derived safeguards have not been made available to the asbestos litigation defendants in actions for punitive damages. Yet, these same defendants are exposed to penalities often in excess of the fine that a related criminal conviction would entail. Such a result is constitutionally impermissible.

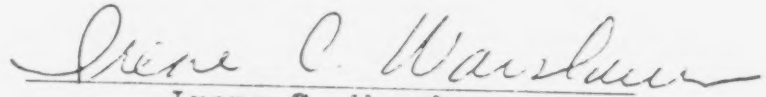
CONCLUSION

The fact that thousands of individuals claim injury from exposure to asbestos-containing thermal insulation products is a national problem which will place demands upon corporate resources for years to come. Although our system of spreading the cost of compensating such injured claimants under a theory of strict liability may serve an important societal end, the imposition of grossly disproportionate and multiple punitive damage awards against defendants not only obstructs that goal, but is constitutionally impermissible because it subjects defendants to excessive and irrational penalties without even providing defendants the constitutional safeguards of the Fifth, Eighth and Fourteenth Amendments.

For the foregoing reasons, Amicus Keene Corporation respectfully prays that

this Court grant the petitions of Raybestos-Manhattan, Inc. and Johns-Manville Sales Corporation for a Writ of Certiorari to review the Judgment and Opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,



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Dated: April 25, 1986

NO. 85-1583

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHNS-MANVILLE SALES CORPORATION
and RAYBESTOS-MANHATTAN, INC. - Petitioners

versus

JAMES LEROY JACKSON --- Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that copies of the Motion For Leave to File Brief Amicus Curiae and Brief of Amicus Curiae Keene Corporation were mailed, first-class postage duly prepaid, this 25th day of April, 1986, to the counsel listed on the

attached Service List and that all parties required to be served have been served.

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